No. 01-309

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

United States District Court
Northern District of Alabama
(Southern Division)

11/14/96	1	*Pro se* Complaint filed (referred to Magistrate Judge ~~Putnam~~)
12/31/96	4	Order requiring Defendants to file special report by 3/3/97
2/19/97	6	Motion by Plaintiff to supplement record to include photographs
2/25/97	7	Motion by Plaintiff to supplement
2/27/97	8	Motion by Defendants to extend time to answer by twenty (20) days
2/28/97	9	Order granting Defendants' motion to extend time to answer by twenty (20) days
3/24/97	11	Special report filed by Defendants
4/7/97	14	Order granting Plaintiff's motion to supplement record to include photographs
4/7/97	15	Order granting Plaintiff's motion to supplement
10/14/97	28	Order that Defendant's special report be treated as a motion for summary judgment
10/17/97	29	Notice of appearance for Plaintiff by attorney James Mendelsohn
10/17/97	30	Plaintiff's preliminary response to Defendant's special report
10/17/97	31	Plaintiff's motion for pro hac vice admission of attorney Craig Jones

11/3/97	32	Second affidavit of Plaintiff Larry Hope
11/3/97	33	Plaintiff's special report and brief in response to motion for summary judgment
11/5/97	35	Order granting Plaintiff's motion for Craig T. Jones to appear pro hac vice
12/27/97	42	Plaintiff's supplemental brief in opposition to summary judgment (deemed filed 12/27/97; docket entry not made until 3/8/00)
4/10/98	–	Docket modification; case referred to Magistrate Judge Ott
11/19/98	35	Notice of reassignment to District Court Judge Buttram
2/19/99	36	Order directing Defendants to file briefs in support of summary judgment within ten (10) days and giving Plaintiff ten (10) days to respond, after which motions to be deemed submitted
2/22/99	37	Defendant's response to order (in support of summary judgment)
3/1/99	43	Plaintiff's second supplemental brief in opposition to summary judgment (deemed filed 3/1/99; not docketed until 3/8/00)
11/26/99	38	Plaintiff's third supplemental brief in opposition to summary judgment
3/10/00	45	Magistrate Judge's Report and Recommendation that Defendants' special reports be treated as motions for summary judgment, that said motions be granted, that this action be dismissed with prejudice, and that any objections be filed within ten (10) days

3/20/00	46	Plaintiff's objection to Magistrate Judge's Report and Recommendation (with exhibits attached)
3/24/00	47	Memorandum opinion by District Court
3/24/00	48	Order in accordance with Memorandum Opinion and adopting Magistrate's Report and Recommendation that Defendant's special reports be treated as motions for summary judgment, that said motions be granted, and that this action be dismissed with prejudice with costs taxed against Plaintiff
4/24/00	49	Notice of appeal and payment of appeal cost

United States Court of Appeals
Eleventh Circuit

4/28/00	Appeal docketed
6/5/00	Appellant's brief and record excerpts filed
7/7/00	Appellees' brief filed
10/26/00	Oral argument conducted; court directs Appellees to file a copy of the Department of Corrections' hitching post policy (which was not in the District Court record)
10/30/00	Appellees file copy of hitching post policy (Administrative Regulation 429)
2/2/01	Opinion issued and judgment entered
2/22/01	Appellant files petition for rehearing en banc
5/7/01	Order denying petition for rehearing en banc
5/16/01	Mandate issued
7/30/00	Notice of petition for writ of certiorari

1983 FORM

Docket Number CV-96-B-2968-S

In the United States District Court
For the Northern District of Alabama

Larry Hope #181215

(Enter above the full name(s) of the plaintiff(s) in this action)

v

Mark Pelzer et. al,

(Enter above full name(s) of the defendant(s) in this action)

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court(s) dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes ( ) No ( )

B. If your answer to A is "yes", describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuit(s) on another piece of paper, using the same outline).

1. Parties to this previous lawsuit

Plaintiff(s): N/A

Defendant(s):

2. Court (If Federal Court, name the district; If State Court, name the county)_____

3. Docket Number N/A

4. Name of judge to whom case was assigned

_____

5. Disposition (for example; Was the case dismissed? Was it appealed? Is it still pending?

_____

N/A

6. Approximate date of filing lawsuit N/A

7. Approximate date of disposition _____

II. Place of present confinement William E. Donaldson Correctional Facility

A. Is there a prisoner grievance procedure in this institution?
Yes ( ) No (✓)

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?
Yes ( ) No (✓)

C. If you answer is YES:

1. What steps did you take? N/A

2. What was the result? N/A

D. If you answer is NO, explain why not? No Grievance Procedure

III. Parties

In item A below, place your name(s) in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.

A. Name of plaintiff(s) Larry Hope

100 Warrior Lane
Address Bessemer Alabama 35023

In Item B, below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use Item C for the names, positions, and places of employment of any additional defendants.

B. Defendant Sgt. Mark Pelzer
Is employed as Sergant Co II Correctional Officer
at Limestone Correctional Facility

C. Additional Defendants Officer McClarn COI Officer Kent COI Officer Jacksons COI Officer Laugan LOI Officer Stephen COI Officer MaGuee COI Lut. Gates

IV. Statement of Claim

State here, as briefly as possible, the FACTS of your case. Describe how each defendant is involved. Include, also, the names of other persons involved, dates and places. *Do not give any legal arguments or cite any cases or statutes*. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet, if necessary.

Please see: Attachment. Attached here to as follows: Next page.

Plaintiffs also desire (invoke 28 USC (2201) & (2202) Declaratory Judgment and Injunctive Relief.

This 42 U.S.C. section 1983 includes a cover letter for clerk

These Defendant's were acting under the color of state law and in violation of Plaintiff's Constitutional Rights etc.

Further Affiant says not.
For Judicial notice, please acknowledge this fact as follows: Plaintiff is now suffering emotional distress and injury he now on medication for facitating his pain and relaxation as prescribed by psychiatrist at this facility, Donaldson Corr.

V. Relief

State briefly ***exactly*** what you want the court to do for you. Make no legal arguments. Cite no cases or statutes

For injury etc as follows:
I, the plaintiff in the entire subject matter ask this Honorable Court to declare that the defendants violated plaintiff's Constitutional Rights and to award to plaintiff from each defendant monetary damages, punitive damages, and compensatory damages any just this court may deem proper. 2 Million dollar to be paid to Plaintiff by Defendant's

"I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
(date)

/s/ Larry Hope
_____
_____
_____
_____
_____
_____
_____
Signature(s)

EXHIBIT 1

Docket Number CV. 96-B-2968-S

AFFIDAVIT

STATE OF ALABAMA)
JEFFERSON COUNTY)

LARRY HOPE, being duly sworn, hereby deposes and says:

I am incarcerated at Donaldson Correctional Facility. I was previously assigned to the Limestone Correctional Facility chain gaing, where I was beaten and twice put on the hitching post.

On May 11, 1995, inmate Tony Perkins and I were having a verbal disagreement while out on the chain gang. Officer McClaran saw us and mistakenly concluded that we were about to assault one another. As a result, he ordered me put on the hitching post for being "disruptive to the work squad."

On June 7, 1995, I went to work along the highway on the chain gang. I took a nap on the bus to the work site because I was extremely tired. When the bus arrived, Officer Laugan stated, "Get you ass off the bus." When I told him that my name was Larry Hope, he stated "I don't give a damn what your name is, get off the bus." He then began choking me.

Because the choking made me unable to breath, I grabbed the officer's neck in retaliation. Officer Laugan then threw his weight off the bus. We both fell off the bus and onto the ground. He landed on top of me and continued choking me.

Officers Kent, Jacksons, Stephen and MaGuee then came and kicked and punched me. As they finally snatched me off the ground, Officer Laugan slammed my head against the bus.

They took me to the health care unit, but I did not receive any treatment for my injuries there. A copy of my medical report is attached.

The guards then put me on the hitching post a second time. I was wearing a T-shirt, and an officer said "take that rag off of him. I have shit I need to clean off the van." They made me take off my shirt and remain shirtless all day while the sum beamed down and burned my skin.

Because I am just slightly taller than the hitching post itself, my arms grew tired from being handcuffed so high. I tried to swing them to improve my circulation, but this caused the cuffs to cut into me. By the time I got off the rail, my wrists were swollen and bruised.

I was very thirsty while on the post. But instead of giving me water, a guard cruelly taunted me about my thirst. He first gave water to some dogs, then brought the water cooler closer to me, removed its lid, and kicked the cooler over, spilling the water onto the ground. This was very frustrating for me.

/s/ Larry Hope
Larry Hope

Sworn before me this the 26 day of March, 1996
/s/ [Illegible]
Notary Public
My Commission Expires:
11-23-96

[The Following Notation was Handwritten – Please Attention the Following:

"Affidavit is being resubmitted to the United States" District Court for the Northern District of Alabama as previously submitted to Southern Poverty Law Center dated March 26, 1996, and is (now) being submitted as ground(s) of the Plaintiff's Civil Action Suit i.e. etc.

L.H. re-initialed date: 11-1-96

L.H.

Plaintiff,

/s/ Larry Hope 181215
Signature of Affiant, Plaintiff]

———

[illegible]ARTMENT OF CORREC[illegible]

EMERGENCY/ _____ TREATMENT RECORD
(OTHER)

DATE 5/11/95 TIME 1550 AM (PM)

FACILITY LCF ☐ SIR ☐ POL ☐ ESCAPEE ☐ _____

☐ EMERGENCY ☒ OTHER

ALLERGIES NKA

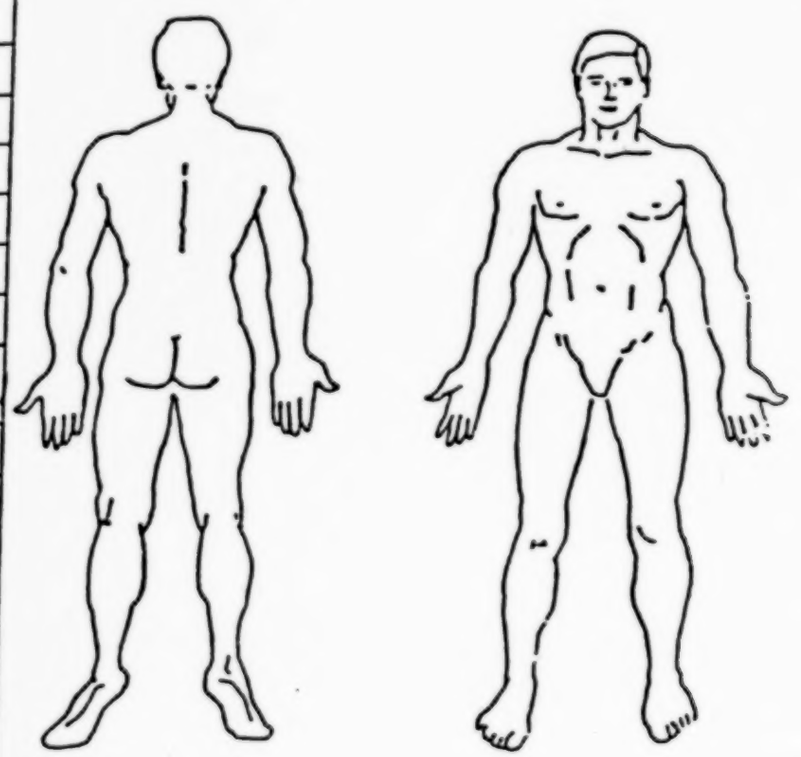
CONDITION ON ADMISSION ☒ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 98° (ORAL) RECTAL RESP. 18 PULSE 72 B/P 130/50 RECHECK IF SYSTOLIC <100> 50 _____

NATURE OF INJURY OR ILLNESS

5" I was cuffed to a pole 'til now

ABRASION/// CONTUSION # BURN XX XX FRACTURE Z Z LACERATION/ SUTURES



PHYSICAL EXAMINATION

5" No bruises contusions fractures or lacerations noted No S/S trauma to head

☒ No S/S trauma to head

ORDERS, MEDICATION, etc.

P Pt was/ated. cuffed on WH & MAC indicated non-compliance Inmate transfer canceled due unfortunately of taking WH & the facilities involved Pt to RC @ this time

DIAGNOSIS

INSTRUCTIONS TO PATIENT

Keep up for sick call as needed

RELEASE/TRANSFER DATE 5/11/95 TIME 1655 AM (PM)

RELEASE/TRANSFERRED TO ☒ DOC ☐ AMBULANCE ☐

CONDITION ON DISCHARGE ☒ SATISFACTORY ☐ POOR ☐ FAIR ☐ CRITICAL

NURSE'S SIGNATURE [illegible] DATE 5/11/95

PHYSICIAN'S SIGNATURE DATE

CONSULTATION

PATIENT'S NAME (LAST, FIRST, MIDDLE) [illegible] AGE DATE OF BIRTH [illegible] R/S [illegible] AIS # [illegible]

EXHIBIT 2

12

BEST AVAILABLE COPY

DEPARTMENT OF CORREC. IS

EMERGENCY/ Non scheduled (OTHER) TREATMENT RECORD

DATE 6-7-95 TIME 11:45 AM PM

FACILITY Dorm 34

☐ SIR ☐ PDL ☐ ESCAPEE ☐

☐ EMERGENCY ☒ OTHER

ALLERGIES N K A

CONDITION ON ADMISSION ☒ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 99.6 ORAL / RECTAL RESP. 18 PULSE 80 B/P 132/78 RECHECK IF SYSTOLIC <100> 50

NATURE OF INJURY OR ILLNESS

S "One of them Djeiss jumped on me"

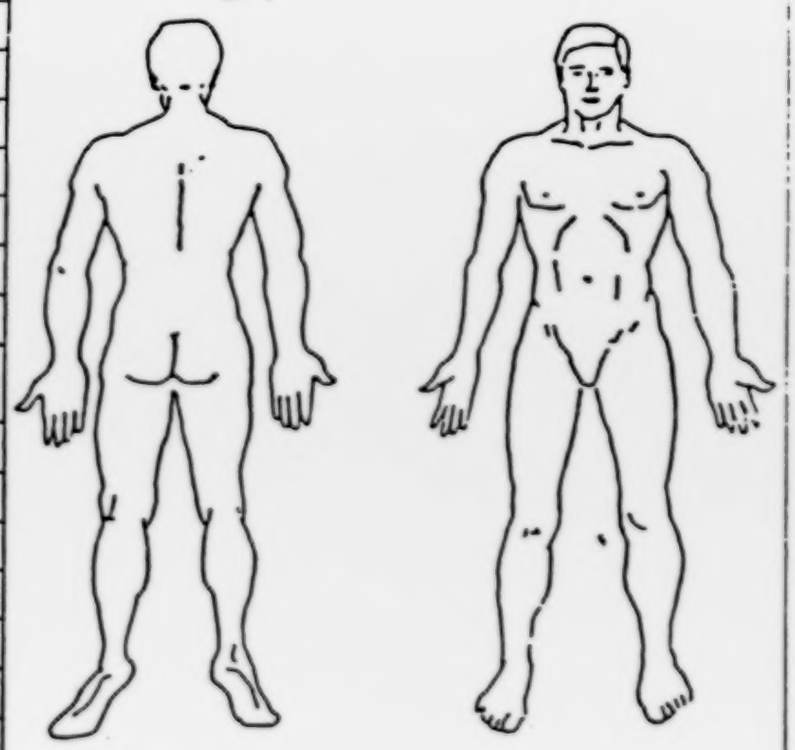
O Speech normal - Fell scattered bruises on left upper Rt. Odd and Rt. Shoulder

PHYSICAL EXAMINATION

Area to right shoulder. No bleeding at this time. No knots on head. Denies any visual disturbances. Ambulates well.

A. minor head and neck trauma to right shoulder

ABRASION/// | CONTUSION // | BURN XX XX | FRACTURE Z Z | LACERATION/ SUTURES



ORDERS, MEDICATION, etc.

P Release to D.O.C. no treatment indicated @ this time

DIAGNOSIS

INSTRUCTIONS TO PATIENT

RELEASE/TRANSFER DATE 6/7/95 TIME 11:45 AM PM

RELEASE/TRANSFERRED TO ☒ DOC ☐ AMBULANCE ☐

CONDITION ON DISCHARGE ☒ SATISFACTORY ☐ POOR ☐ FAIR ☐ CRITICAL

NURSE'S SIGNATURE Wilda Archuleta DATE 6-7-95

PHYSICIAN'S SIGNATURE DATE

CONSULTATION

PATIENT'S NAME (LAST, FIRST, MIDDLE) Hugo Dan

AGE 38 DATE OF BIRTH 7/5/57 R/S R/R AIS # 181215

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE,	)	
	)	**CIVIL ACTION NO.**
Plaintiff,	)	**96-B-2968-S**
vs.	)	
	)	
MARK PELZER, et al.,	)	
	)	
Defendants.	)	

SPECIAL REPORT

Come now the Defendants, Pelzer, McClaran, Jackson, MeGee, Stepheson, and Gates, in the above-styled cause, by and through undersigned counsel and hereby files his Special Report as follows:

PLAINTIFF'S ALLEGATIONS

Plaintiff, alleges his constitutional rights have been violated in the following manner:

1. Defendant McClaran handcuffed him to a "hitching post" on May 11, 1995, in violation of the Eighth Amendment.

2. On June 7, 1995, Defendants violated his Eighth Amendment by using excessive force and by placing him on the "hitching post."

DEFENSES

The Defendants allege that Inmate Hope fails to state a cause of action against them for which relief can be granted.

Defendants are entitled to qualified good faith immunity from Plaintiff's complain under 42 U.S.C. 1983.

Defendants are entitled to absolute immunity for all claims against him in his official capacity.

Defendants assert the doctrine of res judicata and/or collateral estoppel and contend he is barred from asserting this claim wherein he asserts monetary damages.

DEFENDANTS

Mark Pelzer, Sergeant at Limestone Correctional Facility (LCF)

Gene McClaran, Correctional Officer at LCF

Greg Jackson, Correctional Officer at LCF

Gary McGee, Correctional Officer at LCF

Joseph Stevenson, Correctional Officer at LCF

Jim Gates, Lieutenant at LCF

STATEMENT OF THE FACTS

On May 11, 1995, Officer McClaran was supervising a squad of inmates who were working along side the roadway. At approximately 11:40 a.m., the plaintiff and another inmates caused a disruption of the work squad by being involved in a verbal confrontation. In addition,

the plaintiff raised a tool towards the other inmate. As a result of this conduct, the plaintiff and the other inmate were removed from the work squad, taken back to the facility and placed the on the restraining bar at approximately 12:30 p.m. While on the restraining bar, the inmates were monitored by a correctional officer who afforded them water and restroom breaks. At approximately 2:30 p.m., the plaintiff was released from the restraining bar per orders of Captain Wise. (see Activity Log attached to Exhibit #7) At approximately 6:50 p.m., the plaintiff was seen by the medical staff. The results of the medical examination indicate: "no bruises, contusions, abrasions, or lacerations noted, no s/s [signs/symptoms] trauma or illness" and the plaintiff was released in satisfactory condition to the officers. (see Emergency/Treatment Record attached to Exhibit #7) Officer McClaren's involvement in this incident was in determining the actions were disruptive to the work squad, that the inmates should be removed from the work squad and in the initial reporting of the incident which led the inmates to be placed on the restraining bar. (see Exhibit #7, Incident Report and Exhibit #2 Affidavit of Officer McClaren)

On June 7, 1995, at 10:30 a.m., Correctional Officers were placing restraining devices on those inmates who were assigned to the chain gang. During this process, Officer Jackson heard Officer Loggins and the plaintiff having a loud verbal confrontation while inside the bus. Officer Jackson entered the bus in order to assist Officer Loggins. Upon entering the bus, Officer Jackson observed the plaintiff trying to grab Officer Loggins by the head or neck. While trying to bring Inmate Hope under control,

Officers Loggins, Jackson and Inmate Hope fell out of the bus. Inmate Hope fell on top of Officer Jackson. At this time Officers Loggins, Jackson and Kent handcuffed Inmate Hope. (Exhibit #3, Affidavit of Officer Jackson) Sgt. Pelzer assisted in the placing of leg irons on the plaintiff and escorting him to the vehicle which would provide transportation back to the facility for the disruptive behavior on the work squad. (Exhibit #1, Affidavit of Sgt. Pelzer) When examined by the medical staff at approximately 11:15 a.m., Inmate Hope's only injury was a minor reddened area to the right shoulder. (Exhibit #8, Emergency/Treatment Record)

ARGUMENTS

RES JUDICATA AND COLLATERAL ESTOPPEL

The Eleventh Circuit has held that "res judicata applies not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the 'operative nucleaus of fact', *NAACP v. Hunt* 891 F.2d 1555, 1560 (11th cir. 1990). A court must look to the factual issues to be resolved in the second cause of action. Moreover, privity exists where a party to the origianl suit is "so closely aligned to a nonparty's interest as to be his virtual representative". *United Merchants & Mfrs. v. Sanders*, 508 So. 2d 689, 692 (Ala. 1987). In this case, the actions are the same – an inmate is attacking the use of the restraining bar on Eighth Amendment grounds. In fact, the plaintiff is a class member in the case styled *Austin et al., v. James, et al.*, Case No. 95-T-637-N, presently pending in the United States District Court for the Middle District of Alabama. In addition, the

plaintiff testified concerning the identical allegations which are the subject matter of this claim. The Defendants contend the Plaintiff is barred from bringing a successive claim in which he seeks monetary damages, after being certified as a class member in a suit which sought only injunctive and declaratory relief.

EXCESSIVE USE OF FORCE CLAIM

Inmate Hope claims that officers used excessive force against him on June 7, 1995. Clearly, the actions taken by the officers were to bring Inmate Hope under control after a loud verbal confrontation occurred in a bus containing other inmates. The Defendants state that "[c]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier*, 417 U.S. 817, 823, 94 S.Ct. 2800, 41 L.Ed.2d 495, 502 (1974)

> [t]he management by a few guards of large numbers of prisoner, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.

Johnson v. Glick, 481 F.2d 1028, 1033 *cert denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).

Whenever prison officials are accused of excessive force, the core inquiry is set forth in *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986): whether the force was applied in a good-faith effort to maintain or

restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. ___, 112 S.Ct. 995, 117 L.Ed.2d 156, 165-166 (1992). Liability requires a showing by the plaintiff that there was no plausible basis for the official belief in the necessity for using the degree of force employed. *Whitley v. Albers*, 475 U.S. at 323 89 L.Ed.2d at 263. The Eighth Amendment's prohibition against cruel and unusual punishment is triggered when an inmate is subjected to "unnecessary and wanton infliction of paid". *Bennett v. Parker*, 898 F.2d 1530, 1532 (11th Cir. 1990).

Several factors identified in *Whitley* control a court's decision on whether a prison guard has used excessive force: (1) the need for the application of force; (2) the relationship between the need and amount of force used; and (3) the extent of the injury inflicted upon the prisoner. *Whitely*, 465 U.S. at 321, 106 S.Ct. at 1085.

Furthermore, the U.S. Supreme Court has clarified the deliberate indifference standard as the proper standard of review for Eighth Amendment claims filed pursuant to 42 U.S.C. § 1983. *Wilson v. Seiter*, 501 U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). The Court held that a prisoner claiming that cruel and unusual punishment had been administered against him must show a culpable state of mind on the part of the correctional officers. Accordingly, an intent requirement is implicit for an Eighth Amendment claim. The Defendants submit that not only is there a lack of an objective violation of the Eighth Amendment, but the subjective element – the intent requirement – has not even been pled.

In this case, the Plaintiff creating a security hazard, attacking Officer Loggins. The officers responded to the aggressive acts of the plaintiff in an attempt to subdue him and remove him from the area and were reasonable given the eligent circumstance of the situation. Thus, Inmate Hope has failed to establish a claim for cruel and unusual punishment.

HITCHING POST CLAIMS

The Eighth Amendment's prohibition of cruel and unusual punishment is triggered when a prisoner is subjected to an "unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 319 (1986). The U.S. Supreme Court has clarified the deliberate indifference standard as the proper standard of review for Eighth Amendment claims filed pursuant to 42 U.S.C. § 1983. *Wilson v. Seiter*, 501 U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). The Court held that a prisoner claiming that the conditions of his confinement violate the Eighth Amendment must show a culpable state of mind on the part of prison officials. Accordingly, an intent requirement is implicit for an Eighth Amendment claim. Defendants submit that not only is there a lack of an objective violation of the Eighth Amendment, but the subjective element – the intent requirement – has not even been specifically pled. Thus, the plaintiff has failed to establish a violation of his constitutional rights.

The Courts will give great deference to prison officials in decisions relating to internal prison security. *Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977). Prison officials "should

be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve order and discipline and maintain institutional security." *Bell v. Wolfish,* 441 U.S. 520, 547 (1979). The Defendants policy and actions in placing the plaintiff on the restraining bar was necessary to eliminate the possibility of disruption of the work squad and to discourage other inmates from exhibiting similar conduct. *Clearly,* the plaintiff was placed on the restraining bar to maintain order on the work squad, and not sadistically for the purpose of causing harm. See *Ort v. White,* 813 F.2d 318 (11th Cir. 1987), *Williams v. Burton,* 943 F.2d 1572 (11th Cir. 1991). Furthermore, the utilization of a restraining bar has been upheld as justified by the Northern District Court of Alabama *Jeffery Lane v. Harry Findley, et al.,* Mag. Op. CV-93-C-1741-S, (N.D. Ala. Aug. 4, 1994) (see attached)

For these reasons, the Defendants contend the successive claim is barred, requests the Honorable Court to note the assertion of the affirmative defense of qualified immunity and as there are no issues of material fact, pursuant to F.R.C.P. 56(b), request that their motion for summary Judgment be granted.

Respectfully submitted,

/s/ Andrew W. Redd KS
ANDREW W. REDD
GENERAL COUNSEL

/s/ Ellen Leonard KS
ELLEN LEONARD
ASSISTANT GENERAL COUNSEL

/s/ Kim Thomas
KIM THOMAS
ASSISTANT GENERAL COUNSEL

ADDRESS OF COUNSEL:

Alabama Department of Corrections
Legal Division
P.O. Box 301501
Montgomery, Alabama 36130
(334) 353-3885

[Certificate Of Service Omitted In Printing]

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE,	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO.
MARK PELZER, ET AL.,	)	CV96-B-2968-S
Defendants.	)	

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Mark Pelzer, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Mark Pelzer, and I am presently employed as a Correctional Officer II, with the Alabama Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

On June 7, 1995, I was the siderider for Lieutenant Jim Gates. My duties as siderider had me at another location. There were other squads working and I was conducting security checks on those squads.

I was not present during the alleged incident. I arrived at the scene after the altercation occurred. My only involvement was to place leg irons on Inmate Hope and escort him to the security vehicle for transport to Limestone Correctional Facility.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Mark A. Pelzer COII
MARK PELZER

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 20 DAY OF March, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE, Plaintiff,	)	
VS.	)	CIVIL ACTION NO. CV96-B-2968-S
GENE McCLARAN, ET AL., Defendants.	)	

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Gene McClaran, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Gene McClaran, and I am presently employed as a Correctional Officer I, with the Alabama Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

I did place Inmate Hope on the Restraining Bar and that was my only involvement with him. No force was used against Inmate Hope during this process.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have

not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Gene McClaran
GENE MCCLARAN

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 27 DAY OF January, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE, Plaintiff,	)	
VS.	)	CIVIL ACTION NO. CV96-B-2968-S
GREGORY JACKSON, ET AL., Defendants.	)	

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Gregory Jackson, who being

known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Gregory Jackson, and I am presently employed as a Correctional Officer I, with the Alabama Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

On June 7, 1995, I, Officer Gregory Jackson, was assigned to the Chain Gang as a Squad Officer. At approximately 10:30 a.m., I heard Officer Ted Loggins and Inmate Larry Hope, B/181215, having a loud verbal confrontation on the bus. I stepped up on the bus. Inmate Hope was trying to grab Officer Loggins around the head or neck area. I assisted Officer Loggins with Inmate Hope when all of us tripped and fell off the bus. Inmate Hope, Officer Loggins, Officer Kent and Officer Mealer fell on top of me while trying to restrain Inmate Hope. At this time, Officer Loggins, Officer James Kent and myself handcuffed Inmate Hope. I did not kick nor did I strike Inmate Hope at any time. Inmate Hope was escorted to Lieutenant Jim Gates' station wagon and placed in it to be transported back to Limestone Correctional Facility.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Gregory Jackson COI
GREGORY JACKSON

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 29 DAY OF March, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE, Plaintiff,	)	
VS.	)	CIVIL ACTION NO.
GARY MCGEE, ET AL.,	)	CV96-B-2968-S
Defendants.	)	

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Gary McGee, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Gary McGee, and I am presently employed as a Correctional Officer I, with the Alabama

Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

I have never kicked or punched Inmate Larry Hope. I have never handcuffed Inmate Hope to the security rail. I was not working on the day the alleged incident occurred. I have no knowledge of the alleged incident.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Gary McGee COI
GARY MCGEE

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 24 DAY OF January, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE, Plaintiff,	)	
VS.	)	CIVIL ACTION NO. CV96-B-2968-S
JOSEPH STEPHENSON, ET AL., Defendants.	)	

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Joseph Stephenson, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Joseph Stephenson, and I am presently employed as a Correctional Officer I, with the Alabama Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

On June 7, 1995, I, Officer Joseph Stephenson, was assigned to the Chain Gang as a side rider to provide extra security. At approximately 10:30 a.m., I observed Officer Ted Loggins tumble off the bus to the ground with an inmate, later identified as Larry Hope, B/181215. At that time, I was approximately 35 yards away and was armed with a shotgun and a .38 caliber pistol, providing security.

I ordered the squad of inmates to sit on the ground. As I turned to look back at the area of the confrontation, I observed Officers James Kent and Greg Jackson assisting Officer Loggins in restraining Inmate Hope. Inmate Hope was then escorted to Lieutenant Jim Gates' station wagon and placed in it to be transported back to Limestone Correctional Facility. At no time did I approach the Officers or the inmate during the confrontation or after the confrontation. I was armed and I was holding security on the squad to prevent a possible escape attempt. I did not kick nor did I strike Inmate Hope at any time.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Joseph Stephenson COI
JOSEPH STEPHENSON

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 24 DAY OF January, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE, Plaintiff, VS. JIM GATES, ET AL., Defendants.	)	CIVIL ACTION NO. CV96-B-2968-S

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Jim Gates, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Jim Gates, and I am presently employed as a Correctional Officer Supervisor I, with the Alabama Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

My name is not contained in the contents of the Complaint. There are no specific allegations in the Complaint for my response. There are no specific allegations against me noted in the Complaint.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have

not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Jim Gates
JIM GATES

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 24 DAY OF January, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 7

STATE OF ALABAMA
BOARD OF CORRECTIONS
INSTITUTIONAL INCIDENT REPORT

1. Institution: Limestone Correctional Facility
2. Date: May 11, 1995
3. Time: 11:40 A.M.
4. Incident Number: LCF-95-1229
5. Location Where Incident Occurred: Interstate 65 north of mile marker 360
6. Type of Incident: Inmate Disagreement
7. Time Incident Reported: 11:41 A.M.

8. Who Received Report: /s/ Mark A. Pelzer COI
Sergeant Mark Pelzer

9. Victim:

a. N/A (Type Full Name) No. _____

b. _____ (Type Full Name) No. _____

10. Suspects:

a. Larry Hope No. B/181215

b. Tony Perkins No. W/181331

c. _____ No. _____

d. _____ No. _____

e. _____ No. _____

11. Witnesses:

a. N/A No. _____

b. _____ No. _____

c. _____ No. _____

d. _____ No. _____

e. _____ No. _____

f. _____ No. _____

g. _____ No. _____

Physical Evidence:

12. Type of Evidence: N/A

_____

13. Description of Evidence: N/A

_____

_____

14. Chain of Evidence: N/A

a. _____

b. _____

c. _____

d. _____

15. Narrative Summary: On May 11, 1995, at approximately 11:40 A.M., Officer Gene McClaran was assigned to chain gang #1. Officer McClaran's responsibilities included monitoring the squad on Interstate 65 just north of mile marker #360. Officer McClaran observed Inmates Larry Hope, B/181215 and Tony Perkins, W/181331 having a verbal disagreement. Officer McClaran attempted to intervene by giving a loud verbal statement to stop! Inmate Hope raised the swing blade he was working with and drew back with intentions of striking Inmate Perkins. Officer McClaran racked the slide bolt closed and instructed all the squad to get on the ground. Officer McClaran notified Sergeant Mark Pelzer of the situation. Officer McClaran's squad remained on the ground except for Inmates Hope and Perkins. Officer McClaran again instructed both inmates to get on the ground. Inmate Hope stated to Officer McClaran "fuck you". Sergeant Pelzer arrived and instructed both inmates to the ground, and they complied. Sergeant Pelzer removed Inmates Hope and Perkins from Officer McClaran's squad placing them in the Institutional transfer van. Officer Brian

Waters escorted Inmates Hope and Perkins to Limestone Correctional Facility at approximately 12:00 p.m.

At approximately 12:20 p.m. Inmates Hope and Perkins were placed on the Institutional security bar by Officer Keith Gates and Mark Dempsey.

At approximately 5:06 p.m. Officer McClaran released Inmate Perkins from the security bar and Nurse Paul Thornhill performed a body chart on Inmate Perkins. Officer McClaran escorted Inmate Perkins to the back gate of the Institution and was checked in by Sergeant Lloyd Wallace. Officer McClaran was notified by Sergeant Pelzer that Inmate Hope was released from the security bar at approximately 2:40 p.m. by Officer Keith Gates per Captain David J. Wise. A body chart was performed on Inmate Hope by Nurse Janet Gilliland at approximately 6:55 p.m. and released to his assigned dormitory. Inmate Hope and Perkins were reassigned to Squad #1. A peace agreement was signed by Inmates Hope and Perkins.

See attached: Body Charts
Activity Logs
Peace Agreements

/s/ Gene McClaran, COI
Gene McClaran, COI

PARTMENT OF CORREC ONS

EMERGENCY/ Non Scheduled TREATMENT RECORD
(OTHER)

DATE 11/11/15 TIME 1106 AM PM | FACILITY LCF ☐ SIR ☐ POL ☐ ESCAPEE ☐ _____ | ☐ EMERGENCY ☑ OTHER

ALLERGIES —

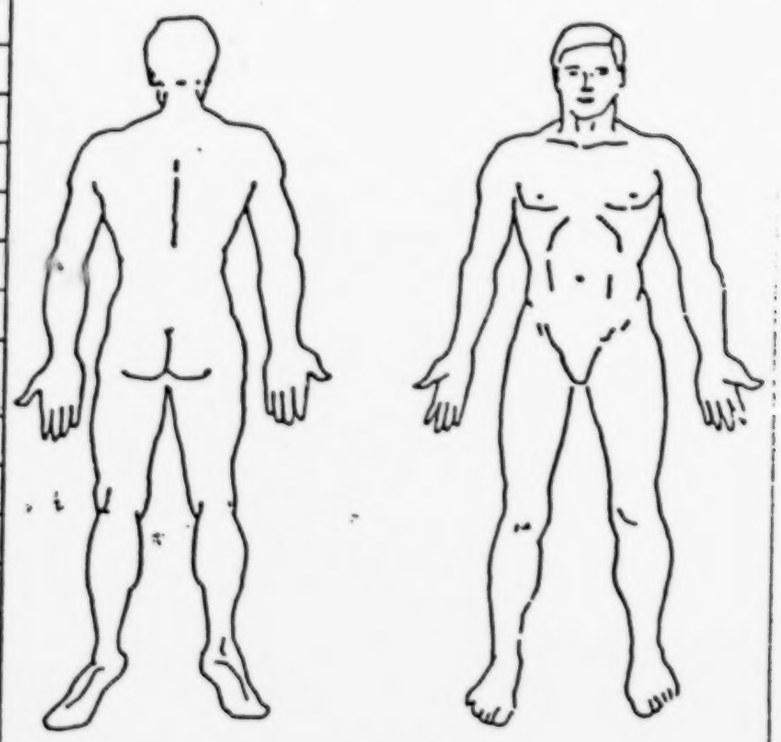
CONDITION ON ADMISSION ☑ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 97.6 ORAL RECTAL RESP. 16 PULSE 74 B/P 126/72 RECHECK IF SYSTOLIC <100 >50 _____

NATURE OF INJURY OR ILLNESS

S: "Don't Dr

ABRASION/// | CONTUSION // | BURN ¤ ¤ | FRACTURE Z Z | LACERATION/ SUTURES



PHYSICAL EXAMINATION

O: No s/sx of acute distress
No s/sx of contagious/transmissible illness

ORDERS, MEDICATION, etc.

A: No acute injury/illness

P: No Tx (a) this visit

DIAGNOSIS

INSTRUCTIONS TO PATIENT

F/u sick call as needed

RELEASE/TRANSFER DATE 11/11/15 TIME 1115 AM PM | RELEASE/TRANSFERRED TO ☐ DOC ☐ AMBULANCE ☐ | CONDITION ON DISCHARGE ☑ SATISFACTORY ☐ FAIR ☐ POOR ☐ CRITICAL

NURSE'S SIGNATURE [redacted] DATE 11/11/15 | PHYSICIAN'S SIGNATURE | DATE | CONSULTATION

PATIENT'S NAME (LAST, FIRST, MIDDLE) [redacted] | AGE 17 | DATE OF BIRTH 1/2/98 | R/S | AIS #

[illegible] DEPARTMENT OF CORREC[illegible]

EMERGENCY/_____ (OTHER) TREATMENT RECORD

DATE 5/11/95 TIME 1150 AM (PM)

FACILITY [illegible] ☐ SIR ☐ POL ☐ ESCAPEE ☐ _____

☐ EMERGENCY ☒ OTHER

ALLERGIES NKA

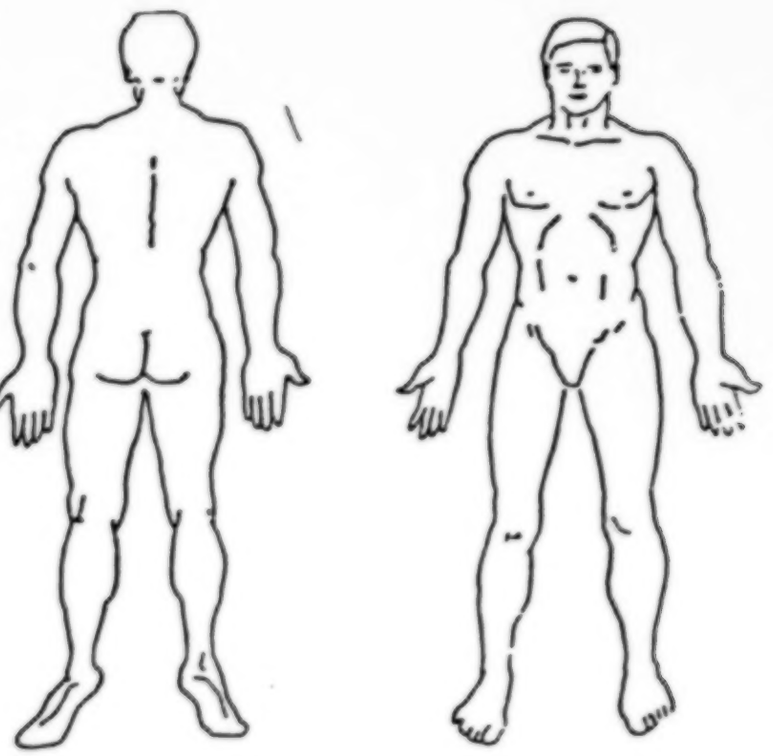
CONDITION ON ADMISSION ☒ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 98.6 (ORAL) RECTAL RESP. 18 PULSE 72 B/P 130/50 RECHECK IF SYSTOLIC <100> 50 _____

NATURE OF INJURY OR ILLNESS

ABRASION// | CONTUSION # | BURN xx xx | FRACTURE ZZ | LACERATION/ SUTURES

S "I was stuffed to a pole today"



PHYSICAL EXAMINATION

S No bruises contusions abrasions or lacerations noted No S/S trauma to Head

O No S/S trauma to Head

ORDERS, MEDICATION, etc.

P Pt was alerted, oriented to WH & MAC educated to compliance with routine strategies counseled about importance of taking WH & the consequences involved

Pt left @ this time

DIAGNOSIS

INSTRUCTIONS TO PATIENT Sign up for sick call as needed

RELEASE/TRANSFER DATE 5/11/95 TIME 1155 AM (PM)

RELEASE/TRANSFERRED TO ☒ DOC ☐ AMBULANCE ☐ _____

CONDITION ON DISCHARGE ☒ SATISFACTORY ☐ FAIR ☐ POOR ☐ CRITICAL

NURSE'S SIGNATURE [illegible] DATE 5/11/95

PHYSICIAN'S SIGNATURE _____ DATE _____ CONSULTATION _____

PATIENT'S NAME (LAST, FIRST, MIDDLE) [illegible] AGE _____ DATE OF BIRTH [illegible] R/S [illegible] AIS # [illegible]

INSTITUTION: LIMESTONE CORP. DATE: 5-11-95

ACTIVITY LOG
**INMATES PLACED ON RESTRAINING BAR

Inmate's Name: LARRY HOPE AIS#: P/181250

Time Inmate Restrained: _____ (AM) 1230/pm [(PM)]

Reason For Restraint:

Refusing to Work Fight _____
Disruptive to Work Squad (Be Specific) _____
a. Refusal to Walk in Prescribed Manner _____
b. Refusal to Carry a Tool to Job Site _____
c. Other (Be Specific) _____

_____

_____

Event/Activity Codes:

1. Meal Accepted
2. Meal Rejected
3. Fluid/Water Accepted
4. Fluid/Water Rejected
5. Restroom Break Accepted
6. Restroom Break Rejected
7. Prescribed Medications Accepted
8. Prescribed Medications Rejected
9. Checked by Health Care Unit
10. Released From Restraining Bar

RECORD EVENT/ACTIVITY CODE
AND INITIAL AT ENTRY

7:00 am	X	12:15 pm	X
7:15 am	X	12:30 pm	4,6
7:30 am	X	12:45 pm	4,6
7:45 am	X	1:00 pm	4,6
8:00 am	X	1:15 pm	4,6
8:15 am	X	1:30 pm	4,6
8:30 am	X	1:45 pm	4,5
8:45 am	X	2:00 pm	4,6
9:00 am	X	2:15 pm	4,6 D.B.
9:15 am	X	2:30 pm	4,6 D.B.
9:30 am	X	2:45 pm	
9:45 am	X	3:00 pm	
10:00 am	X	3:15 pm	
10:15 am	X	3:30 pm	
10:30 am	X	3:45 pm	
10:45 am	X	4:00 pm	
11:00 am	X	4:15 pm	
11:15 am	X	4:30 pm	
11:30 am	X	4:45 pm	
11:45 am	X	5:00 pm	
12:00 noon	X		

Comments: Released at 9:30 PM Per Capt. Wise

**Restraining Bar to be used only during daylight hours.

Annex A to AR 119

INSTITUTION: Limestone Corp. DATE: 5-11-95

ACTIVITY LOG
**INMATES PLACED ON RESTRAINING BAR

Inmate's Name: Tony Perkins AIS#: W/151331

Time Inmate Restrained: _____ (AM) 1230/pm [(PM)]

Reason For Restraint:

Refusing to Work	Fight
Disruptive to Work Squad (Be Specific)	
a. Refusal to Walk in Prescribed Manner	
b. Refusal to Carry a Tool to Job Site	
c. Other (Be Specific)	

Event/Activity Codes:

1. Meal Accepted
2. Meal Rejected
3. Fluid/Water Accepted
4. Fluid/Water Rejected
5. Restroom Break Accepted
6. Restroom Break Rejected
7. Prescribed Medications Accepted
8. Prescribed Medications Rejected
9. Checked by Health Care Unit
10. Released From Restraining Bar

RECORD EVENT/ACTIVITY CODE
AND INITIAL AT ENTRY

7:00 am	X	12:15 pm	X
7:15 am	X	12:30 pm	4,6
7:30 am	X	12:45 pm	4,6
7:45 am	X	1:00 pm	4,6
8:00 am	X	1:15 pm	4,6
8:15 am	X	1:30 pm	4,6
8:30 am	X	1:45 pm	4,5
8:45 am	X	2:00 pm	4,6
9:00 am	X	2:15 pm	4,6 D.B.
9:15 am	X	2:30 pm	4,6 D.B.
9:30 am	X	2:45 pm	4,6 D.B.
9:45 am	X	3:00 pm	4,6 D.B.
10:00 am	X	3:15 pm	4,6 D.B.
10:15 am	X	3:30 pm	4,6 D.B.
10:30 am	X	3:45 pm	4,6 D.B.
10:45 am	X	4:00 pm	3,6 D.B.
11:00 am	X	4:15 pm	4,6 D.B.
11:15 am	X	4:30 pm	4,6 D.B.
11:30 am	X	4:45 pm	4,6 D.B.
11:45 am	X	5:00 pm	10 D.B.
12:00 noon	X		

Comments: Released by Sgt Pelger at 5:00 PM D.B.

**Restraining Bar to be used only during daylight hours.

Annex A to AR 129

BEST AVAILABLE COPY

DEPARTMENT OF CORREC. IS

EMERGENCY/ Non scheduled (OTHER) TREATMENT RECORD

DEFENDANT'S EXHIBIT #8

DATE	TIME	FACILITY	
6-7-95	11 AM PM	Dorm 34	☐ EMERGENCY ☒ OTHER
		☐ SIR ☐ POL ☐ ESCAPEE ☐	

ALLERGIES N K A

CONDITION ON ADMISSION ☒ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 99.6 ORAL / RECTAL RESP. 18 PULSE 80 B/P 132 / 74 RECHECK IF SYSTOLIC <100 > 50

NATURE OF INJURY OR ILLNESS

S "One of them officers jumped on me" LD

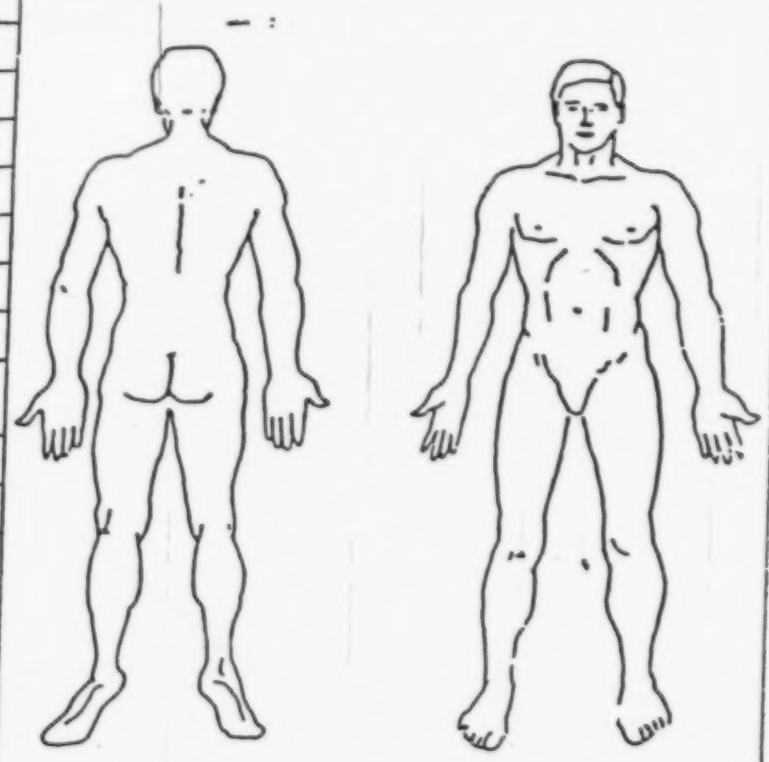
O Speech normal - Few scattered lacerations to L/L arm & right Reddened

PHYSICAL EXAMINATION

Area to right shoulder. No bleeding at this time. No Knots on head. Denies any visual disturbances. Ambulates well.

A. minor reddened area to right shoulder

ABRASION///	CONTUSION //	BURN XX XX	FRACTURE Z Z	LACERATION/ SUTURES



ORDERS, MEDICATION, etc.

P Release to D.O.C No treatment indicated @ this time

DIAGNOSIS

INSTRUCTIONS TO PATIENT

RELEASE/TRANSFER DATE	TIME	RELEASE/TRANSFERRED TO	CONDITION ON DISCHARGE
6 / 7 / 95	11:30 AM PM	☒ DOC ☐ AMBULANCE ☐	☒ SATISFACTORY ☐ POOR ☐ FAIR ☐ CRITICAL

NURSE'S SIGNATURE	DATE	PHYSICIAN'S SIGNATURE	DATE	CONSULTATION
Willa Nicholas	6-7-95			

PATIENT'S NAME (LAST, FIRST, MIDDLE)	AGE	DATE OF BIRTH	R/S	AIS #
Hogo Dan	38	7/5/57	B/M	181215

C.C.I.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE, Plaintiff, v. MARK PELZER, GENE MCCLARAN, GREG JACKSON, GARY MCGEE, JOSEPH STEPHENSON, JIM GATES A/K/A KEITH GATES, JAMES KENT, and TED LOGGINS, Defendants.	*	CIVIL ACTION NO. 96-B-2968-S

SECOND AFFIDAVIT OF LARRY HOPE

(Filed Nov. 3, 1997)

COMES NOW the undersigned affiant and, being duly sworn, hereby deposes and states as follows:

1.

My name is Larry Hope, I am above the age of majority, and I am competent to testify about the matters contained in this affidavit as well as in my first affidavit dated March 26, 1996, a true and accurate copy of which is attached hereto as Exhibit "1" and is fully incorporated herein by reference. Both affidavits are based upon my own personal knowledge and are submitted for consideration by the Court in opposition to the Defendants' motion for summary judgment.

2.

I am the Plaintiff in the above captioned lawsuit, which I filed *pro se* while I was incarcerated and before I was able to retain legal counsel.

3.

In March of 1995 I was forty (40) years old and was incarcerated, for the first time in my life, at Limestone Correctional Facility, which is operated by the Alabama Department of Corrections.

4.

On May 11, 1995, while I was incarcerated at Limestone, I was working on a chain gang near an interstate highway when another inmate, Tony Perkins, started an argument with me.

5.

Defendant Gene McClaran ordered us to stop arguing and, mistakenly concluding that the argument was my fault, sent me back to the Limestone facility and ordered that I be placed on the hitching post because he claimed that I was being "disruptive to the work squad;" however, I had neither refused to work nor encouraged other inmates not to work at the time of that incident.

6.

Upon my return to Limestone, I was placed on the "hitching post" – meaning that my wrists were handcuffed to a horizontal pole that is approximately the same height as my head – in accordance with Defendant McClaran's instructions.

7.

I believe that the officer who actually put me on the hitching post was Defendant Sergeant Mark Pelzer; however, according to the incident report signed by Defendant McClaran and attached hereto as Exhibit "2" (which is also Exhibit "7" to Defendants' Special Report), I was placed on the hitching post by Defendant Gates and an officer named Mark Dempsey.

8.

Because I am just slightly taller than the hitching post itself, my arms grew tired from being handcuffed so high, and whenever I tried moving them to improve my circulation, the handcuffs would cut into my wrists and cause great pain and discomfort.

9.

I was forced to stand in this position for more than two (2) hours, after which I was released because a captain determined that the incident had been Perkins' fault rather than my own.

10.

I was not given any disciplinary write-up for the March 11 incident, nor had I been given any type of hearing before being placed on the hitching post on that date.

11.

I was again placed on the hitching post on June 7, 1995, after a fight which was started by a correctional officer who had cursed me and grabbed me by the neck because I was sleeping on the bus on the way to a work site.

12.

Because I began choking as a result of being grabbed by the neck, I tried to release the officer's grip by grabbing for his neck, at which time other officers became involved.

13.

I was then subdued, handcuffed, placed in leg irons, transported back to Limestone, and put on the hitching post by Defendants Loggins, Kent, Jackson, Stephenson, and McGee.

14.

The officer who actually cuffed me to the hitching post on June 7 was Defendant Gates.

15.

The photographs attached as Exhibits "3," "4, and "5" were taken while I was on the hitching post on June 7, and they are true and accurate depictions of me at that time and place.

16.

On June 7, I was left on the hitching post for approximately seven (7) hours, standing on my feet with my arms raised and restrained in very hot weather.

17.

As before, my ordeal on the hitching post was a very painful one, and whenever I tried to shift my weight or give my feet some relaxation, it would put a lot of pain on my wrist.

18.

While I was on the hitching post, I was deprived of water and was teased by two officers when I asked for water. On one occasion, they started to bring me water but ended up giving my water to some dogs. I was given some water once or twice during the entire seven hours, but that was not enough, and at one point during the hottest part of the day I was left without water for at least three hours.

19.

In addition to being to being deprived of water, I was teased by officers just for being on the hitching post.

20.

When I was finally released, my wrists were sore and appeared to be bruised. They became swollen and remained that way for at least another day.

21.

I did not receive a disciplinary charge or behaviour citation as a result of the June 7 incident, nor had I received a hearing of any kind before being placed on the hitching post.

/s/ Larry Hope
LARRY HOPE

Sworn and subscribed before me
this 27th day of October, 1997.

/s/ Barbara McQueen
NOTARY PUBLIC
[SEAL]

My commission expires: 8/19/98

Prepared by:

CRAIG T. JONES
Georgia Bar No. 399476
Lead counsel for Plaintiff
(Pro hac vice application pending)
CRAIG T. JONES, P.C.
3166 Mathieson Drive
Atlanta, GA 30305
(404) 842-0851

[Certificate Of Service Omitted In Printing]

EXHIBIT 1

Docket Number CV-96-B-2968-S

AFFIDAVIT

STATE OF ALABAMA)
JEFFERSON COUNTY)

LARRY HOPE, being duly sworn, hereby deposes and says:

I am incarcerated at Donaldson Correctional Facility. I was previously assigned to the Limestone Correctional Facility chain gang, where I was beaten and twice put on the hitching post.

On May 11, 1995, inmate Tony Perkins and I were having a verbal disagreement while out on the chain gang. Officer McClaran saw us and mistakenly concluded that we were about to assault one another. As a result, he ordered me put on the hitching post for being "disruptive to the work squad."

On June 7, 1995, I went to work along the highway on the chain gang. I took a nap on the bus to the works site because I was extremely tired. When the bus arrived, Officer Laugan stated, "Get you ass off the bus." When I told him that my name was Larry Hope, he stated "I don't give a damn what your name is, get off the bus." He then began choking me.

Because the choking made me unable to breathe, I grabbed the officer's neck in retaliation. Officer Laugan then threw his weight off the bus. We both fell off the bus and onto the ground. He landed on top of me and continued choking me.

Officers Kent, Jacksons, Stephen and MaGueee then came and kicked and punched me. As they finally snatched me off the ground, Officer Laugan slammed my head against the bus.

They took me to the health care unit, but I did not receive any treatment for my injuries there. A copy of my medical report is attached.

The guards then put me on the hitching post a second time. I was wearing a T-shirt, and an officer said "take that rag off of him. I have shit I need to clean off the van." They made me take off my shirt and remain shirtless all day while the sum beamed down and burned my skin.

Because I am just slightly taller than the hitching post itself, my arms grew tired from being handcuffed so high. I tried to swing them to improve my circulation, but this caused the cuffs to cut into me. By the time I got off the rail, my wrists were swollen and bruised.

I was very thirsty while on the post. But instead of giving me water, a guard cruelly taunted me about my thirst. He first gave water to some dogs, then brought the water cooler closer to me, removed its lid, and kicked the cooler over, spilling the water onto the ground. This was very frustrating for me.

/s/ Larry Hope
Larry Hope

Sworn before me this the 26 day of March, 1996

/s/ [Illegible]
Notary Public
My Commission Expires:
11-23-96

[The Following Notation Was Handwritten – Please Attention the Following:

"Affidavit is being resubmitted to the United States" District Court for the Northern District of Alabama as previously submitted to Southern Poverty Law Center dated March 26, 1996, and is (now) being submitted as ground(s) of the Plaintiff's Civil Action Suit i.e. etc.

L.H. re-initialed date: 11-1-96

L.H.

Plaintiff,

/s/ Larry Hope 181215
Signature of Affiant, Plaintiff]

EXHIBIT 2

STATE OF ALABAMA
BOARD OF CORRECTIONS
INSTITUTIONAL INCIDENT REPORT

1. Institution: Limestone Correctional Facility
2. Date: May 11, 1995
3. Time: 11:40 A.M.
4. Incident Number: LCF-95-1229
5. Location Where Incident Occurred: Interstate 65 north of mile marker 360
6. Type of Incident: Inmate Disagreement
7. Time Incident Reported: 11:41 A.M.

8. Who Received Report: /s/ Mark A. Pelzer COI
Sergeant Mark Pelzer

9. Victim:

a. N/A (Type Full Name) No. _____

b. _____ (Type Full Name) No. _____

10. Suspects:

a. Larry Hope No. B/181215

b. Tony Perkins No. W/181331

c. _____ No. _____

d. _____ No. _____

e. _____ No. _____

11. Witnesses:

a. N/A No. _____

b. _____ No. _____

c. _____ No. _____

d. _____ No. _____

e. _____ No. _____

f. _____ No. _____

g. _____ No. _____

Physical Evidence:

12. Type of Evidence: N/A

_____

13. Description of Evidence: N/A

_____

_____

14. Chain of Evidence: N/A

a. _____

b. _____

c. _____

d. _____

15. Narrative Summary: On May 11, 1995, at approximately 11:40 A.M., Officer Gene McClaran was assigned to chain gang #1. Officer McClaran's responsibilities included monitoring the squad on Interstate 65 just north of mile marker #360. Officer McClaran observed Inmates Larry Hope, B/181215 and Tony Perkins, W/181331 having a verbal disagreement. Officer McClaran attempted to intervene by giving a loud verbal statement to stop! Inmate Hope raised the swing blade he was working with and drew back with intentions of striking Inmate Perkins. Officer McClaran racked the slide bolt closed and instructed all the squad to get on the ground. Officer McClaran notified Sergeant Mark Pelzer of the situation. Officer McClaran's squad remained on the ground except for Inmates Hope and Perkins. Officer McClaran again instructed both inmates to get on the ground. Inmate Hope stated to Officer McClaran "fuck you". Sergeant Pelzer arrived and instructed both inmate to the ground, and they complied. Sergeant Pelzer removed Inmates Hope and Perkins from Officer McClaran's squad placing them in the Institutional transfer van. Officer Brian

Waters escorted Inmates Hope and Perkins to Limestone Correctional Facility at approximately 12:00 p.m.

At approximately 12:20 p.m. Inmates Hope and Perkins were placed on the Institutional security bar by Officer Keith Gates and Mark Dempsey.

At approximately 5:06 p.m. Officer McClaran released Inmate Perkins from the security bar and Nurse Paul Thornhill performed a body chart on Inmate Perkins. Officer McClaran escorted Inmate Perkins to the back gate of the Institution and was checked in by Sergeant Lloyd Wallace. Officer McClaran was notified by Sergeant Pelzer that Inmate Hope was released from the security bar at approximately 2:40 p.m. by Officer Keith Gates per Captain David J. Wise. A body chart was performed on Inmate Hope by Nurse Janet Gilliland at approximately 6:55 p.m. and released to his assigned dormitory. Inmate Hope and Perkins were reassigned to Squad #1. A peace agreement was signed by Inmates Hope and Perkins.

See attached: Body Charts
Activity Logs
Peace Agreements

/s/ Gene McClaran, COI
Gene McClaran, COI

LIFE MAGAZINE October 1945

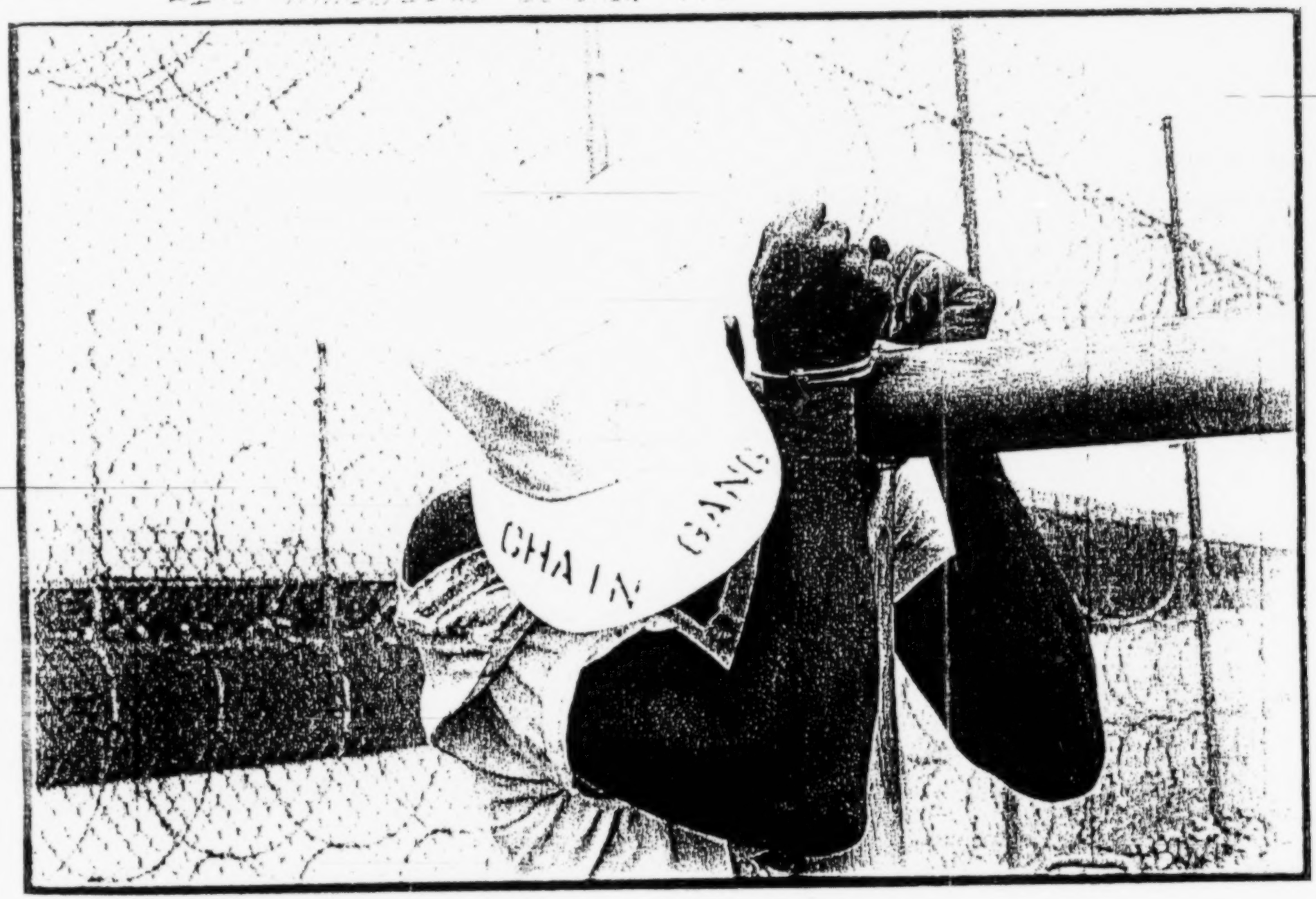


Exhibit 4

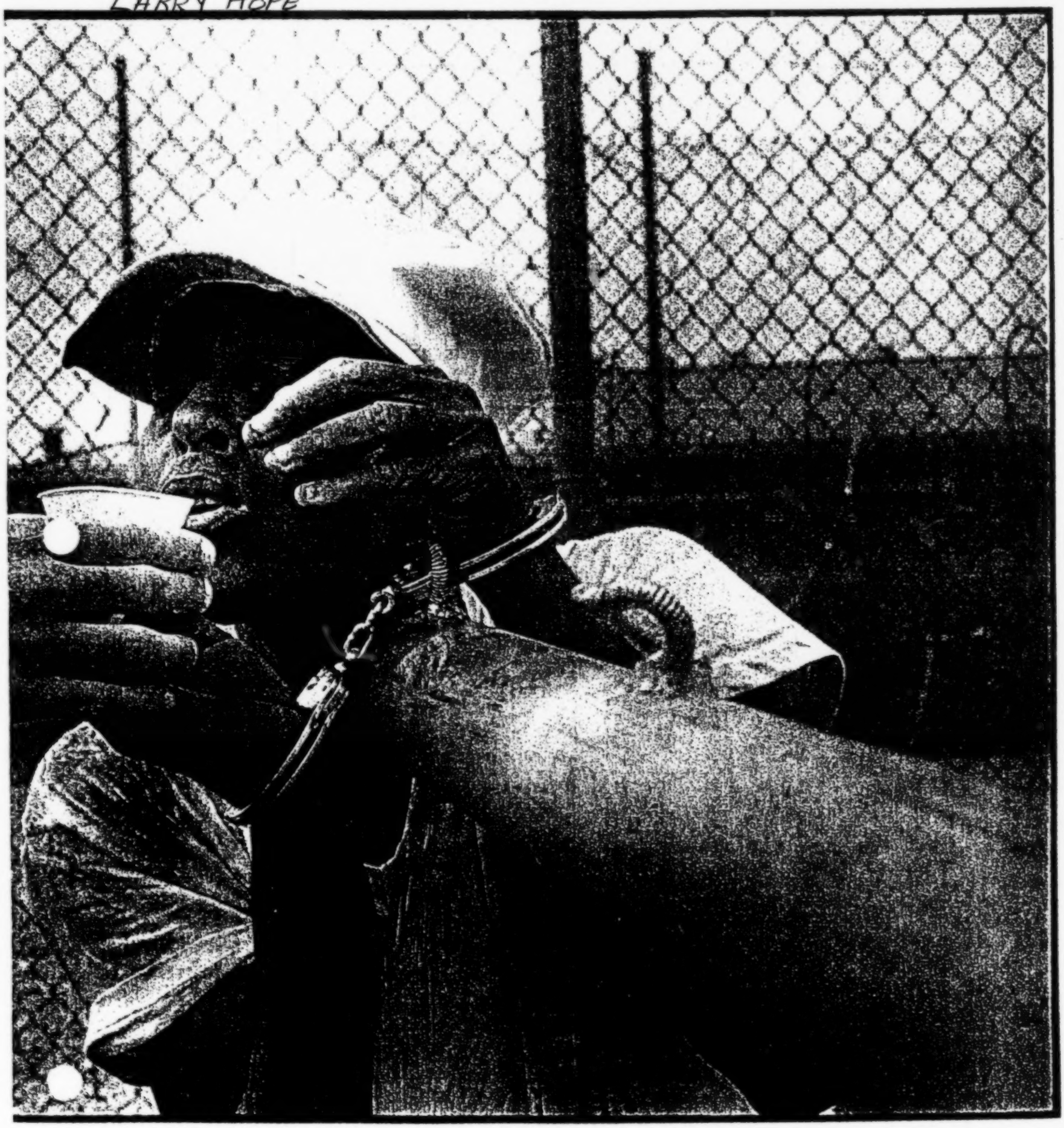
PLEASE ACKNOWLEDGE PHOTO EXHIBIT OF PLAINTIFF
THIS PHOTO WAS USED BY SOUTHERN POVERTY
LAW CENTER CV-910-B-1968-S

LIFE Mag.
October 1995

PLAINTIFF'S EXHIBIT 20

S. BU CONVICTS HATE BEING ON DISPLAY AND GIVING UP TV, SMOKING AND COFFEE PRIVILEGES.

LARRY HOPE





Larry Hope was refused water while hitched to the post during hot weather.

'Painful and Torturous Punishment' Must Be Abolished, Judge Says

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE,	)	
Plaintiff,	)	**CIVIL ACTION NO. 96-BU-2968-S**
vs.	)	
MARK PELZER, et al.,	)	
Defendants.	)	

RESPONSE TO COURT ORDER

Come now the Defendants, in the above-styled cause, by and through undersigned counsel, and hereby file this response to the Court Order stating as follows:

REMAINING ISSUES

Based on a conference call-on February 12, 1999, the remaining issues in this case are as follows:

I. Whether Res Judicata applies to the issues in this case?

II. Whether Inmate Hope pled a violation of the 14th Amendment?

III. Whether a claim for a 14th Amendment violation is barred based res judicata by *Austin v. James*?

IV. Whether the Defendants' use of the restraining bar on May 11, 1995, against Inmate Hope constituted cruel and unusual punishment?

V. Whether the Defendants' use of the restraining bar on June 7, 1995, against

Inmate Hope constituted cruel and unusual punishment?

VI. Whether the Defendants are entitled to qualified immunity from the Plaintiff's claim concerning use of the restraining bar violating the Eighth Amendment?

DEFENSES

The Defendants allege that Inmate Hope fails to state a cause of action against them for which relief can be granted.

Defendants are entitled to qualified good faith immunity from Plaintiff's complaint under 42 U.S.C. 1983.

Inmate Hope's claim under 42 U.S.C. § 1983 against the Defendants are partially based upon the theory of Respondeat Superior and cannot be maintained under 42 U.S.C. § 1983.

Defendants assert the doctrine of res judicata and/or collateral estoppel and contends he is barred from asserting this claim wherein he asserts monetary damages.

STATEMENT OF THE FACTS

Facts are set out in the special reports filed by the Defendants. Inmate Hope was placed on the restraining bar on two occasion, May 11, 1995 and June 7, 1995. Inmate Hope received no injuries from being placed on the restraining bar (Exhibit 1 – Body Chart May 11, 1995.)

ARGUMENTS

I. Whether Res Judicata applies to the issues in this case?

The Eleventh Circuit has held that "res judicata applies not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the 'operative nucleaus of fact' ". *NAACP v. Hunt* 891 F.2d 1555, 1560 (11th Cir. 1990). A court must look to the factual issues to be resolved in the second cause of action. Moreover, privity exists where a party to the original suit is "so closely aligned to a nonparty's interest as to be his virtual representative." *United Merchants & Mfrs. V. Sanders,* 508 So. 2d 689, 692 (Ala. 1987). In this case, the actions are the same – an inmate is attacking the use of the restraining bar on Eighth Amendment grounds. In fact, the plaintiff is a class member in the case styled *Austin, et al., v. James, et al.,* Case No. 95-T-637-N which held that the restraining bar at times had been applied unconstitutionally under Eighth Amendment but ruled in favor of the Department of 14th Amendment grounds. This Plaintiff is a class member and testified at the hearing. Plaintiff's counsel claims that the settlement agreement concerning the chain gang allows them to file for money damages concerning the restraining bar. The settlement agreement of the chain gang issue has no effect on the restraining bar issue. There has been no agreement that money damages can be pursued concerning the restraining bar. Plaintiffs' counsel in the class action addressing the restraining bar chose not to pursue money damages. Therefore, money damage claims for use of the restraining bar are barred by res judicata.

II. Whether Inmate Hope pled a violation of the Fourteenth Amendment?

Defendants' contend that Plaintiff never pled a violation of the Fourteenth Amendment concerning use of the restraining bar. Thus, the Fourteenth Amendment is not an issue in this case.

III. Whether a claim for a 14th Amendment violation is barred based res judicata by *Austin v. James*?

In *Austin v. James*, the District Court held that the restraining bar only violated the Eighth Amendment (Exhibit 2 – p. 1 of the Memorandums Opinion and Judgment). Thus, the claim of the Fourteenth Amendment is barred.

IV. Whether the Defendants use of the restraining bar on May 11, 1995, against Inmate Hope constituted cruel and unusual punishment?

This issue has been previously addressed in Defendants' Special Report.

V. Whether the Defendants use of the restraining bar on June 7, 1995, against Inmate Hope constituted cruel and unusual punishment?

This issue has been previously addressed in Defendants' Special Report.

VI. Whether the Defendants are entitled to qualified immunity from the Plaintiff's claim concerning use of the restraining bar violating the Eighth Amendment?

A review of the Plaintiff's claims reveal the plaintiff has failed to establish the requisite causal connection between the supervisory defendants and the alleged constitutional deprivation. Any allegation by the Plaintiff against supervisory officers other than correctional officers Is, is an attempt to hold them liable in their supervisory capacity. Supervisory officials are not liable under Section 1983 on the basis of respondeat superior or vicarious liability. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct 2018, 56 L. Ed.2d 611 (1978); *Dean v. Barber*, 951 F.2d 1210, 1215 (11th Cir. 1992). Supervisory officials "[can]not be held liable under § 1983 for having the 'mere right to control without any control or direction having been exercised.' " *Gilmere v. Atlanta*, 774 F.2d 1495, 1504 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986), quoting *Monell, supra*, 436 U.S. at 694 n.58, 98 S.Ct. at 2037 n.58.

A supervisor may be liable under § 1983 if he or she participates directly in acts constituting a constitutional violation or if the challenged actions are causally connected to a constitutional violation. *H.C. v. Jarrard*, 786 F.2d 1080, 1086-87 (11th Cir. 1986); *Dean v. Barber, supra.*

The Correctional Defendants have previously asserted the affirmative defense of qualified immunity. The defendants assert that they are entitled to qualified immunity for all those claims which seek money damages. It has long been the law that public officials are

entitled to qualified immunity from damages if "their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would know." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The Supreme Court in *Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), clarified the appropriate standard by concluding that qualified immunity "turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time [the action] was taken". The Court went on to note that, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. at 640.

Qualified immunity is an affirmative defense which must be asserted by the official claiming it. *Siegert,* ___ U.S. at ___, 114 L.Ed.2d at 286; *Harlow,* 457 U.S. at 815; *Gomez v. Toledo,* 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). In determining qualified immunity, the Eleventh Circuit follows a two-step analysis:

> "1. The Defendant public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Rich v. Dollar,* 841 F.2d 1558, 1563 (11th Cir. 1988). . . . "
>
> and
>
> 2. Once the Defendant public official satisfies his burden of moving forward with the evidence, the burden shifts to the Plaintiff to show lack of good faith on the Defendants part. This burden is net by proof demonstrating that the Defendant public official's actions 'violated clearly established constitutional law.' "

Suissa v. Fulton County, Georgia, 74 F.3d 266, 269 (11th Cir. 1996), *Lowe v. Aldridge,* 958 F.2d 1565, 1570 (11th Cir. 1992).

There is no question, and the court has previously determined, that the Defendants actions were taken within the scope of his discretionary authority. As outlined in *Jordan v. Doe,* 38 F.3d 1559 (11th Cir., 1994), "discretionary authority" can be shown by "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." In reversing the lower court, *Jordan* held that the Marshall's actions in that case were "discretionary" regardless of whether the actions could be characterized as ministerial or discretionary in nature and that it would be unwise to "engage in a case by case determination" of immunity based upon ministerial versus the discretionary nature of a particular act challenged. As the first criteria is apparent, the burden shifts to the Plaintiff to show a lack of good faith by proving that the actions undertaken by these Defendants violated clearly established law. To overcome this enormous burden, a Plaintiff must come forward with particularized facts demonstrating why the public official is not entitled to claim that defense. *Anderson v. Creighton,* 483 U.S. at 646; *Harlow,* 457 U.S. at 818. The burden on a plaintiff opposing a qualified immunity defense is onerous.

> A plaintiff must establish more than broad legal truisms; he or she must demonstrate that the law fixed the contours of the right so clearly that

> a reasonable official would have understood his acts were unlawful. . . . Thus, "pre-existing law must dictate, that is truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances."

Dolihite v. Maughon, 74 F.3d 1027, 1040-1041 (11th Cir.), cert. denied, ___ U.S. ___, 117 S.Ct. 185 (1996) (citations omitted)

As the Eleventh Circuit has espoused, general propositions "have little to do with the concept of qualified immunity." *Muhammad v. Wainwright*, 839 F.2d 1422, 1424 (11th Cir. 1987). As articulated in *Muhammad*:

> The words "clearly established . . . constitutional right" may not be used to read the defense of immunity out of federal tort law by the facile expedient of stating constitutional rights in the most general possible terms, so that anyone who prevails on the merits of the claim based on (for example) the First Amendment's free exercise of religion clause, however novel that claim is, can defeat the defense of immunity simply by pointing out that the right to the free exercise of one's religion has long been a clearly established right. The right must be sufficiently particularized to put potential Defendants on notice that their conduct probably is unlawful.

839 F.2d at 1425, quoting *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986).

Moreover, the Eleventh Circuit, in *Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989), further clarified this concept by

stating that the question concerning qualified immunity must be sharply focused:

> The question in this case is not whether it is clearly established that unreasonable seizures are prohibited; they are. Nor is the question whether probable cause is necessary for a lawful warrantless arrest; it is. Nor is the question whether an involuntary trip to the police station can violate the fourth amendment; it can. The question in this case is far more sharply focused: in March 1983, was it clearly established in this circuit that it was an unconstitutional seizure for a single police officer – shortly after a murder – to have a person in a public place accompany him (along with other family members who were potential witnesses) to police headquarters for further questions, where the person had initiated contact with law enforcement officials by going to a police station to report the murder, had claimed to have seen the shooting and the assailant who was still at large, had remained in the officer's presence while willingly assisting with the investigation, and never objected to traveling to headquarters? The answer is No.

In *Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1150 (11th Cir., 1994) (en banc), the Court commented that:

> "The most common error we encounter, as a reviewing court, occurs on this point: Courts must not permit Plaintiffs to discharge their burden by referring to general rules and to the violation of abstract 'rights' ".

In *Alexander v. University of North Florida*, 39 F.3d 290 (11th Cir. 1994), the Eleventh Circuit observed: "As we

explained in *Lassiter v. Alabama A & M University,* 28 F.3d 1146 (11th Cir. 1994) (en banc), qualified immunity for government officials is the rule, liability and trials for liability the exception." Moreover, in *Belcher v. City of Foley, Alabama,* 30 F.3d 1390, 1400 (11th Cir. 1994), the Court found that "law is clearly established by holdings, not by inferences from language in opinions." As if to strengthen this already straightforward rule, the Eleventh Circuit reiterated that in order for a law to be "clearly established", the law by which officials should be evaluated must be 1) pre-existing; 2) obvious and 3) mandatory. *Hill v. DeKalb Regional Youth Detention Center,* 40 F.3d 1176 (11th Cir. 1994). Qualified immunity must focus on the " . . . actual, on the specific, on the details of concrete cases". *Lassiter* at 1150. "Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases" *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563 (11th Cir. 1992).

In *Williams v. Burton,* 943 F.2d 1572 (11th Cir. 1991), a panel of the Eleventh Circuit Court of Appeals rejected an Eighth Amendment claim when an inmate was gagged and shackled in 4-point restraints for approximately 28½ hours. The Court reasoned that the inmate was threatening and attempting to incite violence by other inmates and that the use of the restraint, securing the inmate to the bunk, was not infliction of unnecessary and wanton pain for malicious or sadistic reasons.

Although the burden is not on the defendants to come forward with case law, the defendants submit that even on May 11, 1995, the first day of the Plaintiff's placement on the restraining bar at Limestone Correctional Facility, it was not clearly established that the use

of the restraining bar was cruel and unusual punishment or amounted to summary punishment violative of the due process clause. They assert that no "bright line", capable of discernment by all but the "plainly incompetent", rule of law had been established regarding the constitutionality of the use of the retraining bar. The defendants agree that District Court decisions, alone, do not establish "clearly defined law" for purposes of qualified immunity. However, the defendants are reminded that they are "not obligated to be creative or imaginative in drawing analogies from previously decided cases" *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563 (11th Cir. 1992).

The Plaintiff relies solely on *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974) to clearly establish that the conduct of the defendants was plainly unconstitutional. However, the reading of this case shows it was a system wide attack on prison conditions and one wherein the governor conceded the unconstitutionality of the conditions. The only mention of behavior similar to that alleged in the plaintiff's complaint is contained in a portion of a paragraph in this thirty-one (31) page opinion, which reads that corporal punishment such as

> administering milk of magnesia as a form of punishment, stripping inmates of their clothes, turning the fan on inmates while naked and wet, depriving inmates of mattresses, hygienic materials, and adequate food, handcuffing inmates to the fence and cell for long periods of time, shooting at and around inmates to keep them standing or moving, and forcing inmates to stand, sit or lie on crates, stumps, or otherwise

> maintain awkward positions for prolonged periods . . . We have no difficulty in reaching the conclusion that these forms of punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.

Gates v. Collier, 501 F.2d at 1306. The opinion in *Gates* does not establish the law "in such concrete and factually defined context" that it would compel all reasonable prison officials, in the defendants position, to conclude that their actions were unlawful. The defendants are "not obligated to be creative or imaginative in drawing analogies from the decision in *Gates*. *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563 (11th Cir. 1992). To require these defendants to draw this legal inference from this sole 1974 decision would be an unrealistic expectation on these defendants. Such an expectation would require these untrained prison officials to draw inferences that even two federal Magistrate Judges, Judge Putnam and Judge McPherson, and two attorneys for parties of record were unable to draw after concerted legal research in the cases of *Whitson v. Lt. Gillikin*, CV-93-H-1517-NE (U.S.D.C. N.D. Ala. 1994) (Exhibit 3) and *Marvin Hudson v. Fob James, et al.*, CV-96-D-1266-N (U.S.D.C. M.D. Ala.). In that case, the plaintiff was represented by counsel and he asserted claims that on July 6, 1993, he was denied needed medical attention and was handcuffed to a rail or bar for a period of eight hours without food, water or the opportunity to use bathroom facilities. In that opinion, Magistrate Judge Putnam found the following facts:

> On July 6, 1993, plaintiff was assigned to work on a farm squad at the Limestone Correctional

> Facility, and shortly before 6:00 a.m. he was ordered to report to work. At that time, the plaintiff informed defendants Gilliken and Wise that he was suffering from a rash and was in need of medical attention. Sgt. Gates asked for the plaintiff's "stop-up" which is a medical authorization from the prison health care unit excusing prisoners from work due to health reasons. Plaintiff stated that he did not have one and that no one in the health care unit would give him a stop-up. Sgt. Gates told plaintiff that he could either go to work or "be placed on the security bar." Plaintiff refused to check out for his farm work unit, so defendant Gates escorted the plaintiff to a long metal bar to which he handcuffed the plaintiff. Plaintiff remained handcuffed at the bar or hitching rail from approximately 6:00 a.m. until approximately 2:00 p.m. that day. Although he had eaten breakfast that morning, he was offered no food or water or given any opportunities to use the bathroom facilities during the eight hour span. The daytime temperature ranged from 90 to 95 degrees. At approximately 2:00 p.m., the plaintiff was released from handcuffs and escorted by another officer to the prison health care unit for an examination. As a result of the handcuffing, the plaintiff suffered lacerations, pain, and swelling in his arms, although he was not treated by a physician at the health care unit.

(See Exhibit 3; Magistrate's Recommendation, *Whitson v. Lt. Gillikin*, CV-93-H-1517-NE (U.S.D.C. N.D. Ala.1994)). In evaluating the plaintiff's claim arising under the Eighth Amendment, the Court found this question "more problematic." Judge Putnam stated,

> He alleges that he was handcuffed to a bar or hitching post for eight hours without food, water, or the use of bathroom facilities in 90 to 95 degree heat. Plaintiff makes a strong argument that the practice of handcuffing recalcitrant prisoners to the security bar for eight hours is cruel and unusual punishment in that it amounts to wanton infliction of pain without penological justification. Because the defendants have pled the defense of qualified immunity, however, the court is not called upon to decide this difficult question because it is apparent that on July 6, 1993, there was no clearly established law identifying this practice as unconstitutional.

(See Exhibit 3, page 7) In evaluating qualified immunity, Judge Putnam continued,

> The court has made a diligent search of the case law to attempt to answer the question whether handcuffing, shackling, or chaining a prisoner to a fixed object for a period of several hours violated the Eighth Amendment prohibition against cruel and unusual punishment. It was with an eye toward this question that the court requested additional briefs from the parties, hoping to have their assistance in identifying any cases that might be said to clearly establish a rule of law in this area. Neither the court not the parties have identified any cases, binding or otherwise in this circuit, in which it was found that the Eighth amendment was violated by shackling or handcuffing a prisoner to a fixed object for a significant period of time due to the prisoner's refusal to work. Indeed the few cases that involve remotely analogous fact situations have upheld the use of physical restraints or coercive measures.

(See Exhibit 3, page 8-9) When considering two decisions from the United States District Court for the Southern and Middle District of Alabama, submitted by the defendants, the Court stated these decisions show "nonetheless the absence of a clearly established right to be free of handcuffing to a fixed object for refusing to work. Whether or not these opinions are ultimately right on the Eighth Amendment question, they demonstrate that this particular Eighth Amendment right was not clearly established." (See Exhibit 3, page 10)

In addition, the defendants submit that the Federal Courts in Alabama have found that the use of the restraining bar did not violate the constitutional rights of the inmates and met constitutional muster in the following cases: *Randall Williamson v. Anderson,* CV-92-H-675-N (U.S.D.C. M.D. Ala.) arising from an incident occurring on May 28, 1992; *Ronald Hollis v. Jim Folsom, et al.,* CV-94-T-0052-N (U.S.D.C. M.D. Ala.), incident occurring March 28, 1993; *Walter Vinson v. Leslie Thompson, et al.,* CV-94-A-268-N (U.S.D.C. M.D. Ala.), *Michael Kimble v. Roy Hightower,* CV-95-B-1328-S (U.S.D.C. N.D. Ala.), incident that arose March 31, 1995; *Randall Ashby v. Steve Dees, et al.,* CV-94-U-0605-NE (U.S.D.C. N.D. Ala.), incident arose March 8, 1994; *Jeffery Lane v. Harry D. Findley, et al.,* CV-93-C-1741-S (U.S.D.C. N.D. Ala.), incident arose August 13, 1993; (See Exhibit 2; Magistrate Recommendations).

In *Marvin Hudson v. Fob James, et al.,* CV-96-D-1266-N (U.S.D.C. M.D. Ala.), the Court was confronted with a challenge to the use of the restraining bar arising from incidents in October of 1995. Admittedly, the Court found that the use of the restraining bar violated plaintiff's

Eighth Amendment rights. However, as the defendants asserted the defense of qualified immunity, the Court was obligated to examine whether the defendants were immune from liability for damages because the right was not "clearly established." In evaluating qualified immunity and granting this affirmative defense, Judge McPherson stated, "The Plaintiff likewise fails to cite the court to any authority which plainly establishes that the practice of confining inmates to a hitching post was constitutionally infirm." Judge McPherson continued in a footnote, "The Court's independent research was equally unsuccessful in identifying any such cases." *Marvin Hudson v. Fob James, et al.*, CV-96-D-1266-N (U.S.D.C. M.D. Ala.).

These District Court decisions, although not in and of themselves enough to clearly establishing law, are sufficient reliable information regarding the status of constitutional law in this area, to lead an objectively reasonable correctional official(s) to believe that their actions in using the restraining bar did not violate well established constitutional rights of the plaintiff, or any other inmate in question.

For the aforementioned reasons, the defendants contend they are entitled to qualified immunity for all claims for monetary damages. As there are no issues of material fact and for the reasons herein stated, Defendants

pursuant to F.R.C.P. 56(b), requests that their motion for summary judgment be granted.

Respectfully submitted,

/s/ Ellen Leonard
ELLEN LEONARD
ASSISTANT GENERAL
COUNSEL

ADDRESS OF COUNSEL:
Alabama Department of Corrections
Legal Division
P.O. Box 301501
Montgomery, Alabama 36130
(334) 353-3885

[Certificate Of Service Omitted In Printing]

BEST AVAILABLE COPY

[illegible]ARTMENT OF CORREC[illegible]

EMERGENCY/(OTHER) TREATMENT RECORD

DATE 5/11/95 TIME 1650 AM (PM)

FACILITY [illegible] ☐ SIR ☐ POL ☐ ESCAPEE ☐

☐ EMERGENCY ☒ OTHER

ALLERGIES NKA

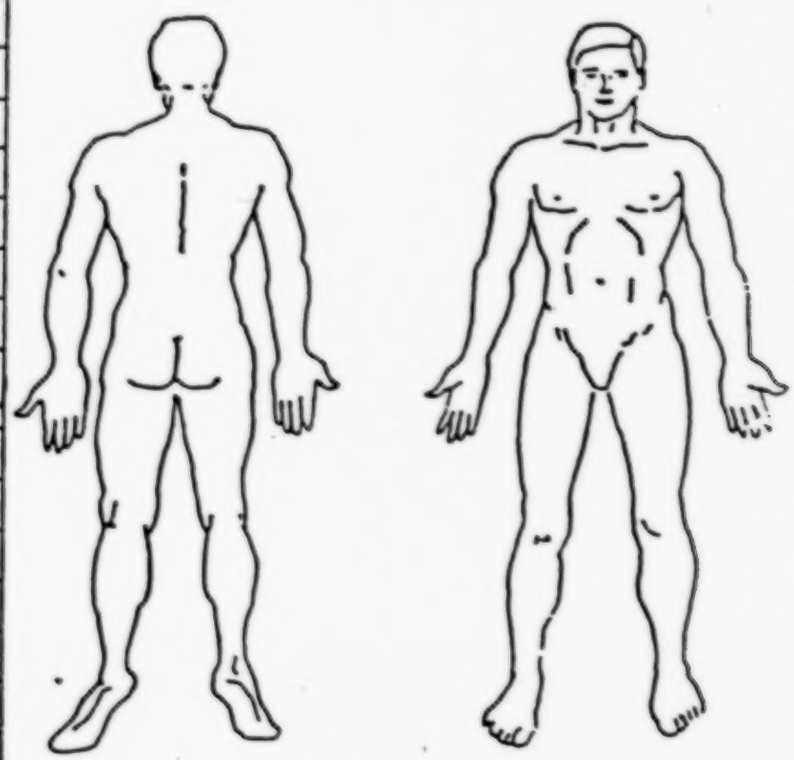
CONDITION ON ADMISSION ☒ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 98.6 (ORAL) RECTAL RESP. 18 PULSE 72 B/P 130/50 RECHECK IF SYSTOLIC <100> 50

NATURE OF INJURY OR ILLNESS

5' I was instructed to a pt. today.

ABRASION/// CONTUSION # BURN XX XX FRACTURE Z Z LACERATION/ SUTURE



PHYSICAL EXAMINATION

5' No bruises contusions fractures or lacerations noted No S/S trauma or illness

12 No S/S trauma or illness

ORDERS, MEDICATION, etc.

P Pt was cited. wrote on WH & MAC submitted for employee transfer transfer canceled sent memo to [illegible] WH & the Dr's involved

Pt left @ this time

DIAGNOSIS

INSTRUCTIONS TO PATIENT

Sign up for sick call as needed

RELEASE/TRANSFER DATE 5/11/95 TIME 1655 AM (PM)

RELEASE/TRANSFERRED TO ☒ DOC ☐ AMBULANCE ☐

CONDITION ON DISCHARGE ☒ SATISFACTORY ☐ FAIR ☐ POOR ☐ CRITICAL

NURSE'S SIGNATURE [illegible] DATE 5/11/95

PHYSICIAN'S SIGNATURE DATE

CONSULTATION

PATIENT'S NAME (LAST, FIRST, MIDDLE) [illegible] AGE DATE OF BIRTH [illegible] R/S [illegible] AIS # [illegible]

EXHIBIT 1

EXHIBIT 2

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE

MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

MICHAEL A. AUSTIN, RICHARD ELLIOT, OGIE LEE HAYES, CHARLES ORLANDER GUESS, WARREN LEATHERWOOD and KERVIN GOODWIN,

Plaintiffs,

v.

JOE HOPPER, Commissioner of the Alabama Department of Corrections,

Defendant.

CIVIL ACTION NO.
95-T-637-N

MEMORANDUM OPINION

(Filed Aug. 10, 1998)

In this class-action lawsuit, the plaintiffs, who are inmates in the Alabama prison system, challenged the following four policies and practices employed by the prison system: (1) the use of "chain gangs"; (2) the use of "hitching posts"; (3) the denial of visitation rights to certain inmates; and (4) the failure to provide adequate toilet facilities to inmates on work squads. The plaintiffs claim that these policies and practices violated the first, fifth, eighth, and fourteenth amendments to the United States Constitution, as enforced through 28 U.S.C.A. § 1983. The plaintiffs named the Commissioner of the

Department of Corrections (hereinafter "DOC") as defendant. The subject-matter jurisdiction of the court has been properly invoked pursuant to 28 U.S.C.A. §§ 1331, 1343(a)(4).

* * *

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

MICHAEL A. AUSTIN,
RICHARD ELLIOT, OGIE
LEE HAYES, CHARLES
ORLANDER GUESS,
WARREN LEATHERWOOD,
and KERVIN GOODWIN,

Plaintiffs,

v.

JOE HOPPER, Commissioner
of the Alabama Department
of Corrections,

Defendant.

CIVIL ACTION NO.
95-T-637-N

JUDGMENT

(Filed Aug. 10, 1998)

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court that the recommendation of United States Magistrate Judge Vanzetta Penn McPherson,

entered January 28, 1997 (Doc. no. 372), is adopted in part and rejected in part:

It is further ORDERED as follows:

(1) The parties' joint motion, filed June 28, 1996 (Doc. no. 155), for approval of the settlement agreement on the chain-gang claim is granted with the modification that the plaintiffs' claim is dismissed *without* prejudice.

(2) Pursuant to said settlement agreement, and on the court's independent evaluation of the certification requirements, the following plaintiff class is certified: all present and future Alabama inmates who have been or may be assigned to work in chain gangs, with the class represented by named plaintiffs Michael A. Austin, Richard Elliot, Ogie Lee Hayes, Charles Orlander Guess, Warren Leatherwood, and Kervin Goodwin.

(3) The plaintiffs' chain-gang claim is dismissed without prejudice.

It is further ORDERED as follows:

(1) The parties' joint motion, filed September 27, 1996 (Doc. no. 344), for preliminary approval of the settlement agreement of the toilet-facilities claim is granted.

(2) A fairness hearing is set for November 17, 1998, at 10:00 a.m. in the second floor courtroom of the federal courthouse in Montgomery, Alabama.

(3) By no later than September 8, 1998, the parties shall file with the court the following:

(a) A joint proposed notice to the members of the putative plaintiff class regarding the settlement;

(b) A joint proposed means of distributing notice to the putative class; and

(c) A joint proposed form for putative class members to use to file their objections.

(4) A status conference on the issue of notice to the putative class is set for September 21, 1998, at 8:00 a.m. in chambers at the federal courthouse in Montgomery, Alabama.

It is further ORDERED that the plaintiff's motion for class certification, filed May 18, 1995 (Doc. no. 8) and amended motion for class certification, filed March 11, 1996 (Doc. no. 74), are granted, and two classes of plaintiffs are certified in this section as follows:

(1) All present and future Alabama inmates who have been or may be assigned to the ATU, with the class represented by named plaintiffs Michael A. Austin, Richard Elliot, Ogie Lee Hayes, Charles Orlander Guess, Warren Leatherwood, and Kervin Goodwin.

(2) All present and future Alabama inmates who have been or may be placed on the hitching post, with the class represented by named plaintiffs Michael A. Austin, Richard Elliot, Ogie Lee Hayes, Charles Orlander Guess, Warren Leatherwood, and Kervin Goodwin.

It is further ORDERED that judgment is entered in favor of defendant Commissioner of the Department of Corrections and against the plaintiffs on the plaintiffs' visitation-privileges claim.

It is further ORDERED as follows:

(1) Judgment is entered in favor of plaintiffs and against defendant Commissioner of the Department of Corrections on the plaintiffs' hitching-post claim.

(2) It is DECLARED that the manner in which defendant Commissioner of the Department of Corrections has used the hitching post violates the eighth amendment to the United States Constitution.

(3) A supplemental hearing is set for September 22, 1998, at 10:00 a.m. in the second floor courtroom of the federal courthouse in Montgomery, Alabama. The parties are to submit prehearing briefs by September 17, 1998.

(4) Defendant Commissioner of the Department of Corrections is allowed until August 24, 1998, to submit to the court a written assurance that he will suspend the use of the hitching post until the parties have had an opportunity to update the court on whether the post is still being used in an unconstitutional manner and whether the post can be used in a constitutional manner. If the court does not receive such an assurance, it will then consider whether to issue interim prospective injunctive relief.

It is further ORDERED that costs are taxed against the defendant Commissioner of the Department of Corrections, for which execution may issue.

DONE, this the 10th day of August, 1998.

/s/ Myron Thompson
UNITED STATES
DISTRICT JUDGE

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JERRY WHITSON, Plaintiff, vs. LT. GILLIKIN; DONNA WISE; DARYL GATES, Defendants.	)	Civil Action CV-93-H-1517-NE (Filed Jan. 24, 1994)

MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION

This is an action by an Alabama prisoner under 42 U.S.C. § 1983, in which he alleges that the named defendants violated his eighth Amendment right to be free from cruel and unusual punishment. He claims that on July 6, 1993, the defendants not only deprived him of needed medical attention, but also handcuffed him to a rail or bar for a period of eight hours without food, water, or the opportunity to use bathroom facilities. In accordance with the usual practices of this court, and 28 U.S.C. § 636(b), the complaint was referred to the undersigned magistrate judge for a preliminary review and recommendation.

The plaintiff filed his pro se complaint[1] on July 30, 1993, naming as defendants Lt. Gillikin, Donna Wise, and

[1] Although the complaint was filed *pro se*, counsel appeared for plaintiff on September 17, 1993.

Daryl Gates[2], all of whom are employed as corrections officers at the Limestone Correctional Facility. He sues the defendants in both their individual and official capacities, for compensatory and punitive damages. In response to the court's order for special report entered August 13, 1993, the defendants filed a special report on September 24, 1993, asserting the defenses of qualified immunity, official capacity immunity and the general denial that they violated the plaintiff's constitutional rights. The special report was supported by the affidavits of defendants Gates and Gilliken.

On October 25, 1993, the plaintiff filed his response and counter-affidavits to the special report filed by the defendants. The plaintiff's response included counter-affidavits by the plaintiff and three other inmates.

In an order dated December 3, 1993, the court requested additional briefs from the parties on the question of qualified immunity, particularly in light of the Eleventh Circuit cases *Courson v. McMillian*, 939 F.2d 1479 (11th Cir., 1991) and *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir., 1993).[3] The parties filed briefs on December 22 and December 30 in response to the court's request.

[2] Although identified by plaintiff as "Daryl" Gates, the defendant's true name is Jim Gates.

[3] By order entered October 6, 1993, the court notified the parties that the special report filed by the defendants would be treated as a motion for summary judgment under Rule 56 F.R.Civ.P.

SUMMARY JUDGMENT STANDARDS

Because the court is treating the special report from the defendants as a motion for summary judgment, the court must determine whether there are any genuine issues of material fact and whether the moving defendants are entitled to judgment as a matter of law. Summary judgment may be granted only if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See F.R.Civ.P. 56.* In making that assessment, the court must view the evidence in a light most favorable to the non-moving party and must draw all reasonable inferences against the moving party. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden of proof is upon the moving party to establish his prima facie entitlement to summary judgment by showing the absence of genuine issues and that he is due to prevail as a matter of law. *See Clark v. Coats & Clark, Inc.,* 929 F.2d 604 (11th Cir., 1991). Once that initial burden has been carried, however, the non-moving party may not merely rest upon his pleading, but must come forward with evidence supporting each essential element of his claim. *See Celotex Corp. v. Catrett; Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Barfield v. Brierton,* 883 F.2d 923 (11th Cir., 1989). Unless the plaintiff, who carries the ultimate burden of proving his action, is able to show some evidence with respect to each element of his claim, all other issues of fact become immaterial and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett; Bennett v. Parker,* 898 F.2d 1530 (11th Cir., 1990). As the Eleventh Circuit has explained:

> Facts in dispute cease to be "material" facts when the plaintiff fails to establish a prima facie case. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure to proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." [Citation omitted]. Thus, under such circumstances, the public official is entitled to judgment as a matter of law, because the plaintiff has failed to carry the burden of proof. This rule facilitates the dismissal of factually unsupported claims prior to trial.

Bennett v. Parker, 898 F.2d at 1532.

Applying these principals to the evidence before the court, the following facts appear to be undisputed or, if disputed, taken in a light most favorable to the plaintiff. On July 6, 1993, plaintiff was assigned to work on a farm squad at the Limestone Correctional Facility, and shortly before 6:00 a.m. he was ordered to report for work. At that time, the plaintiff informed defendants Gilliken and Wise that he was suffering from a rash and was in need of medical attention. Defendant Gates asked for the plaintiff's "stop-up" which is a medical authorization from the prison health care unit excusing prisoners from work due to health reasons. Plaintiff stated that he did not have one and that no one in the health care unit would give him a stop-up. Sgt. Gates told plaintiff that he could either go to work or "be placed on the security bar." Plaintiff refused to check-out for his farm work unit, so defendant Gates escorted the plaintiff to a long metal bar to which he handcuffed the plaintiff. Plaintiff remained handcuffed at the bar or hitching rail from approximately 6:00 a.m. until

approximately 2:00 p.m. that day. Although he had eaten breakfast that morning, he was offered no food or water or given any opportunities to use bathroom facilities during the eight hour time span. The daytime temperature ranged from 90 to 95 degrees. At approximately 2:00 p.m., the plaintiff was released from handcuffs and escorted by another officer to the prison health care unit for an examination. As a result of the handcuffing, the plaintiff suffered lacerations, pain, and swelling in his arms, although he was not treated by a physician at the health care unit. Later that evening, at 11:30 p.m., the plaintiff was seen by health care personnel again and given Calamine Lotion and Benadryl for a rash. He was not, however, given a stop-up or an excuse from work by medical personnel.

DISCUSSION

Plaintiff has pled two claims for relief under § 1983. His first claim alleges that he was denied needed medical attention in violation of his Eighth Amendment right to be free from cruel and unusual punishment. Similarly, his second claim for relief asserts that his Eighth Amendment right was violated by the defendants when Sgt. Gates handcuffed him to the security bar for a period of eight hours after he refused to work. Plaintiff has sued the defendants for compensatory and punitive damages in both their official and personal capacities.

Insofar as the plaintiff seeks damages against the defendants in their official capacities, they are entitled to Eleventh Amendment immunity. As officers of the state, the defendants are merely the alter-egos of the state and

cannot be sued for damages. *See Alabama v. Pugh* 438 U.S. 781 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *Tittle v. Jefferson County Commission,* ___ F.3d ___ (11th Cir., Case No. 91-7054, January 6, 1994). Moreover, officials of a state sued in their official capacity are not "persons" within the meaning of § 1983 and, hence, are not subject to liability in their official capacity. *See Will v. Michigan Dept. of State Police* 491 U.S. 58 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Thus, the claim for damages against the defendants in their *official* capacities is due to be dismissed.

Although not subject to suit in their official capacities, state agents or employees are subject to suit under § 1983 in their *individual* capacities. It is as individuals that they are sued for allegedly violating the plaintiff's Eighth Amendment rights by denying him medical care and subjecting him to unduly harsh and punitive conditions.

The Eighth Amendment prohibition against cruel and unusual punishment imposes a duty on state prison officials to provide prisoners with reasonable medical care for their serious medical needs. An action for damages will lie only where the plaintiff shows that the defendants were deliberately indifferent to his serious medical needs. *See Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). As pled in this case, the plaintiff asserts that he had a rash the morning of July 6, 1993 and was in need of medical attention, which was denied by these defendants. The undisputed facts show further, however, that plaintiff's rash was not a "serious" medical need. The Eighth Amendment does not require medical attention for every ache, pain, or physical infirmity identified by

prisoners; it is offended only if prison officials are deliberately indifferent to *serious* medical needs. *See Estelle v. Gamble, supra; Hamm v. DeKalb County* 774 F.2d 1567 (11th Cir., 1985); *Wilson v. Franceschi,* 735 F.Supp 395 (M.D.Fla., 1990). Not every headache or stomach pain that can be the subject of a prisoner complaint implicates the serious concerns of the Eighth Amendment.

In this case, to the extent the plaintiff suffered from a rash, it was not so serious as to justify immediate attention or to excuse him from his assigned work detail. The undisputed evidence establishes that the plaintiff was examined by medical personnel in the health care unit around 2:00 p.m. yet did not receive Calamine Lotion and Benadryl for a rash until much later that evening, at 11:30 p.m. Even then, however, plaintiff was not given a stop-up by medical personnel or excused from work in the days that followed. Plaintiff's rash on the morning of July 6, 1993, was not a serious medical need in the sense that it required immediate medical intervention or was debilitating. The decision by defendants not to excuse the plaintiff from his assigned work detail because of a rash was not deliberate indifference given the plaintiff's statement that medical personnel had refused to give him a stop-up and in light of the relatively minor treatment given for the rash later that day and night. The defendants were not, therefore, deliberately indifferent to the plaintiff's *serious* medical needs and did not violate the Eighth Amendment in this respect.

Plaintiff's second claim under the Eighth Amendment is far more problematic. He alleges that he was handcuffed to a bar or hitching post for eight hours

without food, water, or the use of bathroom facilities in 90 to 95 degree heat. Plaintiff makes a strong argument that the practice of handcuffing recalcitrant prisoners to the security bar for eight hours is cruel and unusual punishment in that it amounts to a wanton infliction of pain without penological justification. Because the defendants have pled the defense of qualified immunity, however, the court is not called upon to decide this difficult question[4] because it is apparent that on July 6, 1993, there was no clearly established law identifying this practice as unconstitutional.

Officials sued under § 1983 are entitled to qualified immunity from damages to the extent that they act within their discretionary authority and they do not violate constitutional rights clearly established at the time of the conduct in question. *See Harlow v. Fitzgerald,* 457 U.S. 800 102 S.Ct. 2727 73 L.Ed.2d 396 (1982); *Swint v. City of*

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[4] Under Eleventh Circuit precedent, the court is not required to decide whether particular conduct actually violates a constitutional right if qualified immunity applies. In *Wright v. Whiddon,* 951 F.2d 297 (11th Cir., 1992), the court of appeals declined to decide whether the shooting of an unarmed pretrial detainee trying to escape violated the Fourth Amendment. Rather, it held simply that the law on this point was not clearly established and, therefore, the defendant was entitled to summary judgment on qualified immunity grounds. The same is true here. This court need not decide whether handcuffing a prisoner to a hitching rail violates the Eighth Amendment because the law is *not* clearly established and, hence, qualified immunity applies. *See also, Adams v. St. Lucie County Sheriff's Department,* 962 F.2d 1563, 1573 (11th Cir., 1992) (Edmondson, J., dissenting) *rev'd en banc* 998 F.2d 923 (11th Cir., 1993) (adopting Edmondson's dissent as opinion of the en banc court).

Wadley, supra. The test of qualified immunity is an objective one, focusing on whether "a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and information possessed by the official at the time the conduct occurred." *Harden v. Hayes,* 957 F.2d 845, 848 (11th Cir., 1992). To be "clearly established," the contours of right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). The unlawfulness of the conduct must be apparent in light of preexistng law for it to be said that a right being violated was clearly established. That standard is objective so that it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 89 L.Ed.2d 271 (1986). Because qualified immunity is not just an immunity from damages, but also an immunity from suit, the burden of proof rest on the plaintiff to show that his right was clearly established at the time of the conduct. *See Davis v. Scherer,* 468 U.S. 183, 104 SCt. 3012, 82 L.Ed2d 139 (1984); *Adams v. St. Lucie County Sheriff's Department,* 962, F.2d 1563, 1574 (11th Cir., 1992) (Edmondson, J., dissenting) *rev'd en banc,* 998 F.2d 923 (11th Cir., 1993) (adopting Edmondson's dissent as opinion of en banc court).

The court has made a diligent search of the case law to attempt to answer the question whether handcuffing, shackling, or chaining a prisoner to a fixed object for a period of several hours violates the Eighth Amendment prohibition against cruel and unusual punishment. It was with an eye toward this question that the court requested

additional briefs from the parties, hoping to have their assistance in identifying any cases that might be said to clearly establish a rule of law in this area. Neither the court nor the parties have identified any cases, binding or otherwise in this Circuit, in which it was found that the Eighth Amendment was violated by shackling or handcuffing a prisoner to a fixed object for a significant period of time due to the prisoner's refusal to work[5]. Indeed, the few cases that involve remotely analogous fact situations have upheld the use of physical restraints or coercive measures. For example, in *Williams v. Burton,* 943 F.2d, 1572 (11th Cir., 1991), a panel of the Eleventh Circuit Court of Appeals rejected the argument that the Eighth Amendment was violated by the gagging and shackling of an inmate in four point restraints for approximately twenty-eight and one-half hours. The court reasoned that the inmate was threatening and attempting to incite violence by other inmates and that the use of the restraint, which involved shackling and handcuffing him to a bunk, was not infliction of unnecessary and wanton pain for malicious or sadistic reasons in violation of the Eighth Amendment. Similarly, in *Ort v. White,* 813 F.2d, 318 (11th Cir., 1987), the court upheld against an Eighth and Fourteenth Amendment challenge not only a correction officer's decision to withhold water from an inmate who was refusing to work on a farm detail, but also the locking of the inmate in a sallyport for several hours. There, the court held that the decision was not punitive but rather

[5] For the law to be clearly established, there must be prior decided cases with "materially similar" facts. *Adams v. St. Lucie County Sheriff's Department, supra* at 1575.

an immediately necessary coercive measure intended to compel the inmate to comply with reasonable rules and regulations.

In addition to these two reported cases from the Eleventh Circuit, the defendants have filed copies of opinions and recommendations in other cases in which inmates have been handcuffed to fixed objects for refusing to work. *See Dale v. Murphy,* (S.D. AL, Case Number 85-1091-H-S; *Williamson v. Anderson,* (M.D. AL, Case Number CV-92-H-675-N). While these opinions are unreported, they show nonetheless the absence of a *clearly* established right to be free of handcuffing to a fixed object for refusing to work. Whether or not these opinions are ultimately right on the Eighth Amendment question, they demonstrate that this particular Eighth Amendment right was not clearly established.

In this case, the plaintiff was refusing to check-out on his work detail. Defendant Gates gave him the choice of either working or being handcuffed to the security bar, plainly attempting to use an immediately necessary coercive measure to end the plaintiff's unilateral refusal to work. As in *Ort,* the danger of allowing one inmate to successfully refuse to work is its temptation to other inmates to do the same. Plainly, Sgt. Gates was acting within his discretionary authority to try to compel the plaintiff to go to work with his farm detail. Regardless of whether the actual measure of handcuffing plaintiff to a securing bar for eight hours violated the Eighth Amendment, it cannot be said that the law was so clearly established on July 6, 1993 that Sgt. Gates, the other defendants, or a reasonable corrections officer would have known that such a practice was unconstitutional.

The unlawfulness of the practice, if any, was not apparent on July 6, 1993 and, indeed, is not apparent *today.* Although it can be argued strenuously both that it is a violation of the Eighth Amendment and that it is not, that is the very essence of qualified immunity. So long as the issue is debatable, it cannot be said to be clearly established. Thus, the defendants are entitled to summary judgment on the basis of qualified immunity.

Based on the foregoing considerations, the magistrate judge **RECOMMENDS** that the motion for summary judgment filed by the Defendants in the above-styled action be **GRANTED** and that the action be **DISMISSED** with prejudice.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal.

The clerk is DIRECTED to send a copy of this report and recommendation to the plaintiff, plaintiff's counsel and to counsel for the defendants.

DATED this 21st day of January, 1994.

/s/ T. Michael Putnam
T. MICHAEL PUTNAM,
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE, Plaintiff, v. MARK PELZER, GENE MCCLARAN, GREG JACKSON, GARY MCGEE, JOSEPH STEPHENSON, JIM GATES A/K/A KEITH GATES, JAMES KENT, and TED LOGGINS, Defendants.	*	CIVIL ACTION NO. 96-B-2968-S

PLAINTIFF'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed Mar. 20, 2000)

COMES NOW the Plaintiff and files this objection to the Magistrate Judge's Report and Recommendation entered March 10, 2000, for the reasons set forth below and in the attached Memorandum Opinion and Order in the similar case of *Fountain v. Talley*, Case No. 94-C-676-N (M.D. Ala. 2/25/00):

SUMMARY OF OBJECTION

1) The Magistrate Judge's Report and Recommendation is inconsistent with rulings in two other hitching post cases in which Middle District judges have refused to let all of the defendants out on qualified immunity. *Fountain v. Talley*, Case No. 94-C-676-N (M.D. Ala. 2/25/00) (attached hereto as Exhibit "A"); *see also Spellman v. Jones*, Case No. 98-A-529-N (M.D. Ala.) (Recommendation of 9/20/99, Order of 10/18/99), since transferred to Southern District, Case No. 99-0949-BH-M (S.D. Ala.)

2) The Magistrate Judge's Recommendation misconstrues the case law with regard to the constitutionality of applying physical restraints – such as shackling to the hitching post or some other fixed object – to an inmate who does not pose a present and immediate threat to human safety or institutional security.

LEGAL ARGUMENT

The Middle District has just released a Memorandum Opinion and Order in another case, *Fountain v. Talley*, Case No. 94-C-676-N (M.D. Ala. 2/25/00), which denied qualified immunity to correctional officers who placed an inmate on the hitching post under similar circumstances. (See copy attached hereto as Exhibit "A"); *see also Spellman v. Jones*, Case No. 98-A-529-N (M.D. Ala.) (Recommendation of 9/20/99, Order of 10/18/99), since transferred to Southern District, Case No. 99-0949-BH-M (S.D. Ala.)[1] The Magistrate Judge's Report and Recommendation in the instant case is inconsistent with the

[1] The decision denying qualified immunity in *Spellman v. Jones*, supra, was merely an order denying the motion to dismiss "at this time" which did not set forth the rationale for the Court's decision; however, in a discovery order by the same Court in yet another hitching post case, Magistrate Judge Walker opined that "it appears that the defendants are not entitled to qualified immunity with respect to the plaintiff's claims challenging the conditions of confinement to which he

qualified immunity rulings in both *Spellman* and *Fountain*, supra, and one of the reasons that the Plaintiffs in these cases are seeking class certification of all hitching post damages claims is to ensure consistent and fair results.[2] While class certification has not yet been granted, it is nonetheless paramount that the same rules apply to all of these cases.

In reaching the conclusions contained in his Report and Recommendation, the Magistrate Judge misconstrued the holding of *Williams v. Burton*, 943 F. 2d 1572, 1576 (11th Cir. 1991), *cert. den.*, 505 U.S. 1208 (1992). In *Williams*, the inmate in question had posed a clear threat to prison security by threatening to kill correctional officers and in fact spitting on one of them, and he continued to yell and make threats after being confined in his cell. On those facts, immediate restraint was necessary, and continued restraint was held to be lawful because the level of disturbance continued for a period of time after the precipitating incident. In the case at bar, however, inmate Hope was twice placed on the hitching post as a punishment for minor disturbances on a highway chain gang

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was subjected while confined to the hitching post . . . " *Hicks v. Allen*, Case No. 96-D-854-N (M.D. Ala. 6/28/99). That analysis is consistent with her recommendation (adopted by the District Court Judge) in *Spellman* and with the exhaustive Memorandum Opinion and Order of Judge Carroll (sitting as trial judge by consent of the parties) in *Fountain v. Talley*, supra.

[2] Plaintiff's counsel represents inmates in approximately ten (10) cases involving the hitching post, and it is believed that there are approximately two hundred (200) other inmates who are entitled to bring similar claims. There is a pending motion for class certification in the case of *Fountain v. Talley*, Case No. 94-A-676-N (M.D. Ala.)

which had already subsided by time he was returned to the prison – one of which was started by another inmate and one of which was caused by an officer. (Hope Affidavit at par. 4-11) Putting Mr. Hope on the hitching post meant that he had to be transported back to the prison facility – after the altercations were over and he was no longer argumentative – which was arguably a greater disruption to prison routine than simply ordering him to resume work or sending him to his cell. In any event, there is no evidence that Mr. Hope's involvement in two off-premises incidents which he has testified were instigated by others caused any threat to safety or security, or that it created a level of disturbance among the prison population anywhere near the level of that involved in the *Williams* case. In the absence of evidence that Hope did anything to incite a riot or other such general disturbance, there was no need to restrain him on a prolonged and painful basis once the precipitating event had subsided.

In misapplying *Williams*, the Magistrate Judge tried to downplay the controlling precedents of *Gates v. Collier*, 501 F. 2d 1291, 1306 (5th Cir. 1974) and *Ort v. White*, 813 F. 2d 318 (11th Cir. 1987). In *Ort v. White*, the Eleventh Circuit approved conduct by prison officials falling far short of the abuse inflicted upon the Plaintiff in this case but nonetheless articulated the following statement of clearly established constitutional law:

> "Clearly, appellant would have a legitimate due process claim if, after the misconduct or disturbance had abated, prison officials had summarily denied him water or imposed any other form of punishment without first affording him

> some type of disciplinary hearing. **A Fourteenth Amendment violation occurs in this context where prison officers continue to employ force or other coercive measures after the necessity for such coercive action has ceased.**"

813 F. 2d at 327 (emphasis added) In the case at bar, the Defendants did precisely what *Ort v. White* says they were not allowed to do – that is, they continued to subject him to prolonged, uncomfortable restraint under circumstances where justification for coercive measures was either wholly lacking or no longer present.

The fact that *Gates v. Collier,* supra, involved multiple issues does not dilute its precedential authority with regard to the issue applicable to this case. In *Gates,* the old Fifth Circuit held as early as 1974 that "handcuffing inmates to the fence and to cells for long periods of time . . . , and forcing inmates to stand . . . or otherwise maintain awkward positions for prolonged periods . . . run[s] afoul of the Eighth Amendment [and] offend[s] contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess". 501 F. 2d at 1306

This particular holding of *Gates v. Collier* has already been applied in the context of the hitching post, not only by Judge Carroll's Memorandum Opinion and Order attached hereto as Exhibit "A", but also by District Court Judge Thompson in *Austin v. James,* Case No. 95-T-637 (M.D. Ala. 8/10/98) – a class action filed by the Southern Poverty Law Center to obtain injunctive and declaratory relief (but not monetary damages). In *Austin,* Judge Thompson held that "as a form of corporal punishment, use of the hitching post offends contemporary standards

of decency as enunciated in *Gates.*" *Austin,* supra, Memorandum Opinion at 134, citing *Gates v. Collier,* 501 F. 2d 1291 (5th Cir. 1974) In the words of Judge Thompson, "the [C]ourt declines to find that society's standards have so devolved since the holding in *Gates* over two decades ago that use of an instrument like the hitching post would be deemed permissible." *Id.*

In considering the Magistrate Judge's Report and Recommendation, Plaintiff respectfully requests that the District Court Judge pay particular deference to the aforementioned authority, some of which was obviously not before the Magistrate Judge at the time he entered his Report and Recommendation.

CONCLUSION

For the reasons set forth in the foregoing Plaintiff's Objection to Magistrate Judge's Report and Recommendation, as well as the briefs and affidavits previously submitted by Plaintiff in opposition to summary judgment, and all exhibits thereto, Plaintiff respectfully requests that the Defendants' motion for summary judgment be denied.

This the 17 day of March, 2000.

/s/ Craig T. Jones
CRAIG T. JONES
Georgia Bar No. 399476
Lead counsel for Plaintiff
(Admitted pro hac vice)

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[Certificate Of Service Omitted In Printing]

[LOGO]

STATE OF ALABAMA
DEPARTMENT OF CORRECTIONS

DON SIEGELMAN
GOVERNOR

MICHAEL W. HALEY
COMMISSIONER

October 26, 2000

Mr. Thomas K. Kahn
Clerk of the Court
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, NW
Atlanta, GA 30303

RE: Hope v. Pelzer, et al.
Appeal No. 00-12150-D

Please find attached the regulation as requested by the Court. Please let me know if I need to do anything furhter.

Sincerely,

/s/ Ellen Leonard
Ellen Leonard
Assistant General Counsel

EL/pga

Attachment

cc: Craig Jones

AFFIDAVIT

Before me, a Notary Public in and for said County and State of Alabama at Large, personally appeared John Q. Hamm, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is John Q. Hamm. I am the Confidential Assistant to the Commissioner of the Alabama Department of Corrections. As part of my duties, I am responsible for the Research and Monitoring Division, which maintains the Department's Administrative Regulations.

I, hereby swear and affirm that the attached document is a true and exact copy of Administrative Regulation No. 429, Refusal to Work, which was in effect in 1995.

/s/ John Q. Hamm
John Q. Hamm

SWORN TO and SUBSCRIBED before me this 26th day of October, 2000.

/s/ Paula G. Argo
NOTARY PUBLIC

My commission expires:

11/15/03

[LOGO]

STATE OF ALABAMA

DEPARTMENT OF CORRECTIONS

Research, Monitoring & Evaluation
50 Ripley St.
Montgomery, Alabama 36130

TOMMY HERRING — **COMMISSIONER**
JIM FOLSON — **GOVERNOR**

October 26, 1993

ADMINISTRATIVE REGULATION NUMBER 429 — **OPE: INSTITUTIONS**

REFUSAL TO WORK

I. GENERAL

This regulation establishes policy regarding the action to be taken when an inmate refuses to work or is otherwise disruptive to the work squad.

II. POLICY

A. It is the policy of the Department of corrections that should an inmate refuse to work or is otherwise disruptive to the work squad, departmental personnel may use such force reasonably necessary to escort the inmate to a permanently affixed restraining bar.

1. Restraining Bar: The restraining bar should be made of sturdy, nonflexible material and should be located no more than 50 feet from an officer. Each facility should have two bars – one mounted 57 inches from the ground for taller inmates and one at 45 inches for the shorter inmates.

a. Upon refusing to work, the inmate will be handcuffed to the restraining bar. Annex A to AR 429 Activity Log, will be completed when an inmate is placed on the restraining bar. If force is used to handcuff the inmate to the restraining bar, a nurse will be contacted to check the inmate's condition. If medical attention is not warranted, at the end of the day the inmate will be carried to the health care unit for a body chart. Fresh water will be available to the inmate. He will be given the opportunity to go to the bathroom once each hour. He will be fed a sack lunch at the restraining bar. At any time during the day the inmate can tell an officer that he is ready to go to work. He will be allowed to join his assigned squad for that day and begin work.

b. When an inmate refuses to work, the health care unit will be contacted to ensure that he does not have a medical stop-up restricting him from work. Inmates placed on the restraining bar that are taking prescribed medication will be given their medicine at the appropriate time at the restraining bar.

c. If the inmate remains at the restraining bar the entire day, he will be checked back into the institution after the last squad is checked in.

d. The inmate will be written a disciplinary for refusal to work.

e. Annex A, Activity log, should be completed on each inmate when he is

placed on the restraining bar. If/when the inmate returns to work, a notation should be made on the form at the time he returns to work. Appropriate entries should be made at the time the event/activity occurs, and initialed by the officer supervising the inmate at the time of the event/activity.

f. Annex A, Activity Log, will be completed on the inmate each day he is on the restraining bar. If a body chart is done on the inmate at anytime he is on the restraining bar, a copy of the body chart should be attached to the completed Annex A, Activity Log.

g. A copy of Annex A, activity log, will be attached to the incident report written on the inmate for refusing to work. A copy should also be retained in the Warden's office.

III. RESPONSIBILITIES

Wardens/Directors will ensure that any additional security measures necessary are in force to preclude escape or disruption of work activities.

IV. SUPERSESSION

This regulation supersedes Administrative Regulation 429 dated November 23, 1983.

/s/ Tommy Herring
Tommy Herring, Commissioner

Annex A Activity Log – Inmates Placed on Restraining Bar

SUMMARY OF CHARGES

To clarify and expand departmental policy when an inmate refuses to work or is otherwise disruptive to the work squad.

INSTITUTION: _____ DATE: _____

ACTIVITY LOG
**INMATES PLACED ON RESTRAINING BAR

Inmate's Name: _____ AISØ: _____

Time Inmate Restrained: _____ (AM) _____ (PM)

Reason for Restraint:

Refusing to Work
Disruptive to Work Squad (Be Specific) _____
a. Refusal to Walk in Prescribed Manner _____
b. Refusal to Carry a Tool to Job Site _____
c. Other (Be Specific) _____

_____

_____

Event/Activity Codes:

1. Meal Accepted
2. Meal Rejected
3. Fluid/Water Accepted
4. Fluid/Water Rejected
5. Restroom Break Accepted
6. Restroom Break Rejected
7. Prescribed Medications Accepted
8. Prescribed Medications Rejected
9. Checked by Health Care Unit
10. Released From Restraining Bar

RECORD EVENT/ACTIVITY CODE AND INITIAL AT ENTRY

7:00 am	_____	12:15 pm	_____
7:15 am	_____	12:30 pm	_____
7:30 am	_____	12:45 pm	_____
7:45 am	_____	1:00 pm	_____
8:00 am	_____	1:15 pm	_____
8:15 am	_____	1:30 pm	_____
8:30 am	_____	1:45 pm	_____
8:45 am	_____	2:00 pm	_____
9:00 am	_____	2:15 pm	_____
9:15 am	_____	2:30 pm	_____
9:30 am	_____	2:45 pm	_____
9:45 am	_____	3:00 pm	_____
10:00 am	_____	3:15 pm	_____
10:15 am	_____	3:30 pm	_____
10:30 am	_____	3:45 pm	_____
10:45 am	_____	4:00 pm	_____
11:00 am	_____	4:15 pm	_____
11:15 am	_____	4:30 pm	_____
11:30 am	_____	4:45 pm	_____
11:45 am	_____	5:00 pm	_____
12:00 noon	_____		

Comments: _____

_____

**Restraining Bar to be used only during daylight hours.

Annex A to AR 429

BEST AVAILABLE COPY